

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0074

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 19, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 122236). Claimant filed a timely request for hearing. On January 10, 2019, ALJ Snyder conducted a hearing, and on January 11, 2019 issued Order No. 19-UI-122600, concluding that claimant's discharge was not for misconduct. On January 22, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Asante employed claimant from sometime in 2000 until October 23, 2018, last as a pharmacy technician.

(2) The employer expected claimant to perform her job satisfactorily and provide acceptable levels of customer service. Claimant understood the employer's expectations as she reasonably interpreted them.

(3) On March 14, April 16, July 3, July 10, July 13 and August 30, 2018, the employer verbally coached or issued written warnings to claimant for various errors, performance deficiencies and customer service inadequacies. The August 30 warning was a final written warning and claimant understood she probably would be discharged if she further violated the employer's expectations.

(4) Despite receiving the warnings, claimant thought that she helped customers "to the best of my ability" and "as best I could." Audio at ~ 26:27, 26:40. After she received the August 30 warning, claimant "was working the best I could trying to make sure that I didn't get any other complaints doing my job." Audio at ~27:00. Claimant wanted to avoid receiving another warning.

(5) On October 20, 2018, claimant helped an out-of-town customer who wanted to fill a prescription. Claimant tried to process the prescription using the insurance card that the customer provided, but the employer's system would not accept the insurance. Claimant consulted the employer's eligibility listings

and determined that the employer did not accept the patient's insurance. Claimant referred the customer to another pharmacy that would accept the insurance. However, a pharmacist who overheard claimant's interaction with the customer intervened at that time, called the out-of-town pharmacy the customer usually used and determined that the customer had a different form of insurance that the employer would accept. As a result, the employer filled the prescription for the customer.

(6) On October 23, 2018, the employer discharged claimant for providing inadequate service to the customer on October 20.

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. Mere inefficiency resulting from a lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b). The employer has 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).

The employer presented evidence showing that it had issued several warnings to claimant before the final incident occurred on October 20, 2018.. However, EAB customarily assesses only the final incident preceding the discharge to determine if claimant engaged in misconduct if, as here, the employer knew of the prior incidents when they occurred. Under these circumstances, having not discharged claimant shortly after the prior incidents occurred, the employer presumably did not consider them sufficient to merit discharge. The October 20 incident therefore is the proper focus of the misconduct analysis.

Claimant's testimony that she tried as best she could to satisfy the employer's expectations after receiving the prior warnings appeared heartfelt and sincere. The employer did not dispute that claimant made good faith efforts to avoid receiving further warnings that might result in her discharge. The employer also did not challenge claimant's testimony that the insurance card the customer gave to her on October 20 was not accepted by the employer's system, and that the employer database that claimant consulted indicated that the employer did not accept the form of insurance shown on the customer's card. At hearing, the employer's position was essentially that claimant should not have accepted the customer's implicit representation that the customer did not have another form of insurance and, like the pharmacist, should have "done a little more research" and called the customer's regular pharmacy to determine if the customer carried additional insurance. Audio at ~12:03. In other words, the employer discharged claimant not because she failed to take any specific steps outlined in a policy, but because it did not occur to her that the customer might not know all of the customer's forms of insurance coverage, and she erred in not contacting a third-party - the customer's regular pharmacy - to obtain more comprehensive information.

Errors, mistakes, and lapses in follow-up of the type the employer contended claimant made on October 20 are 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). Because the employer did not present additional evidence showing that claimant was conscious of her conduct when she allegedly violated the employer's standards on October 20, the employer did not meet its burden to demonstrate that claimant engaged in misconduct. As well, it appears that claimant's failure to be alert to the possibility that the customer might have additional insurance coverage was likely due to lack of knowledge and information. Inefficiencies that are the result of a lack of job skills or experience are not misconduct. *See* OAR 471-030-0038(3)(b).

The employer failed to show that claimant's discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on her work separation from the employer.

DECISION: Order No. 19-UI-122600 is affirmed.

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

DATE of Service: February 15, 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 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 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

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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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