

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0099

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 16, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying act (decision # 111642). Claimant filed a timely request for hearing. On January 3, 2019, ALJ Seideman conducted a hearing, and on January 11, 2019 issued Order No. 19-UI-122627, concluding the employer discharged claimant for misconduct. On January 30, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she sought to introduce certain information not offered into evidence during the hearing. 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). Claimant also failed to show that factors or circumstances beyond her reasonable control prevented her from offering the new information during the hearing as required by OAR 471-041-009092) (October 29, 2006). For these reasons, EAB considered only information received into evidence at the hearing when reaching this decision. However, had EAB considered claimant's new information, the result of this case would not be different for the reasons explained below.

FINDINGS OF FACT: (1) Tosoh Quartz Inc. employed claimant as a planner from May 7, 2018 until September 6, 2018.

(2) The employer expected claimant to give notice when she was going to be absent and, as appropriate, to provide a physician's note excusing the absence.

(3) At hire, claimant had a severe alcohol disorder. Claimant did not inform the employer of the disorder.

(4) After hire, claimant realized she needed treatment to control her addiction to alcohol. On June 29, 2018, a center for addiction medicine center evaluated claimant, found that she had a severe alcohol disorder, and prescribed medicine to assist her in maintaining sobriety. On July 20, 2018, a health care

provider performed an examination and alcohol assessment examination of claimant. Claimant notified the employer of both of these absences and brought in physician's notes excusing those absences. Between her hire date and September 5, 2018, claimant missed brief periods of work due to her alcohol abuse disorder but always notified the employer that she was going to be absent and brought in physician's notes excusing the absences.

(5) As of September 5, 2018, claimant had concluded that she needed more intensive treatment for her alcohol disorder than she had been receiving. On that day, claimant sent a text message to her supervisor notifying him that she was going to be absent and would be contacting the employer's human resources department. Also on that day, claimant contacted a human resources representative and told the representative that she was being treated for an alcohol disorder and needed more treatment, which was the first notice the employer had of her alcohol abuse. Claimant sought advice from the representative as to whether leave was available to cover absences she might accrue as a result of seeking treatment for alcohol disorder and how she could maintain her employment during that treatment. The representative told claimant he would get back in touch with her when he had more information and recommended that she call the employee assistance program (EAP) for additional help. Claimant called the EAP that day and made an appointment with one of its counselors for September 6, 2018.

(6) On September 6, 2018, the human resources representative contacted claimant. He told claimant that leave was not available to cover any treatment-related absences she might accrue because she had not yet worked enough hours to qualify for it. He told claimant that the employer had rejected continuing her employment under a last chance agreement while she sought treatment for her alcohol disorder. On that day, the representative also told claimant that she was discharged. The reason for the discharge was that the employer did not believe claimant was able to provide a date by which her treatment for alcohol disorder would be completed and she would be able to attend work on a consistent basis.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

ORS 657.176(2)(g) requires a disqualification from benefits if, among other things, the employer discharged claimant for being absent from work if the absence occurred as a result of the use of alcohol on a second or subsequent occasion within a period of 12 months unless claimant was participating in a recognized alcohol rehabilitation program at the time of the absence or within 10 days after the date of the discharge and claimant provides certain documentation of that program participation.

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. Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b). 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).

In Order No. 19-UI-122627, the ALJ concluded claimant was disqualified from benefits under ORS 657.176(2)(a) and OAR 471-030-0038 because she was discharged for misconduct. The ALJ appeared to reason that claimant's failure to disclose to the employer that she had a severe alcohol disorder, combined with absences she allegedly incurred due to the disorder, constituted a willful violation of the employer's standards. Order No. 19-UI-122627 at 2. We disagree with the ALJ's conclusion that the employer met its burden to show that it discharged claimant for misconduct. Although the ALJ did not address the applicability of ORS 657.176(2)(g) to claimant's discharge, we conclude it is not applicable on the facts of this case.

At the outset, the employer discharged claimant because she sought permission to be absent from work for treatment of a severe alcohol disorder and she was not able to give the employer a date by which the treatment would be successfully completed and she would return to work. While the employer's witness also referred to absences claimant had before September 5, which the witness suggested might have been the result of alcohol use, those absences do not appear to be the proximate reason that the employer discharged claimant. Claimant's request for permission to take time off on September 5 for purposes of treatment of an alcohol disorder is the focus of the analysis as to whether claimant is disqualified from benefits.

With respect to the applicability of ORS 657.176(2)(g), there was no evidence that claimant's absence from work on September 5 was a direct result of having consumed alcohol, *i.e.*, that she was unable to work because of physical effects from alcohol use. The Department interprets ORS 657.176(2)(g) to disqualify a claimant from benefits only for absences or tardiness that "must occur as the direct result of using alcohol, e.g., the worker was either too drunk or too hungover to be on time or to report to work at all. Other results of the use of alcohol, such as incarceration, court appearances, loss of transportation, etc., are not 'direct' results of the use of alcohol for purposes of ORS 657.176(2)(g)." Unemployment Insurance Benefits Manual (8/21/13 rev.) §462. Because the absence that claimant sought permission for on September 5 was for treatment of alcohol disorder, and was not the direct result of an inability to work due to alcohol consumption, she is not disqualified from benefits under ORS 657.176(2)(g).

With respect to the applicability of ORS 657.176(2)(a) and OAR 471-030-0038(3)(a), the employer did not present evidence from which it may be inferred that claimant knew or should have known that her request to have time off on September 5 to treat a severe alcohol disorder would violate the employer's standards. In addition, it is commonly recognized that certain types of alcohol disorders are diseases or illnesses. The employer did not suggest or show that claimant was citing alcohol disorder as a pretext to excuse her absence from work beginning on September 5 or that the alcohol disorder that claimant experienced was not properly characterized as an illness. Absences due to illness are also not misconduct.

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

DECISION: Order No. 19-UI-122627 is set aside, as outlined above.

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

DATE of Service: February 28, 2019

NOTE: This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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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