

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0157

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 2, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 154016). Claimant filed a timely request for hearing. On February 5, 2019, ALJ Meerdink conducted a hearing, and on February 6, 2019 issued Order No. 19-UI-124132, concluding that claimant's discharge was not for misconduct. On February 11, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument to EAB. However, the employer did not certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The employer's argument also contained information that was not part of the hearing record and the employer also did not show that factors or circumstances beyond its reasonable control prevented it from offering that information during the hearing as required by OAR 471-041-0090(2) (October 29, 2006). For these reasons, EAB did not consider claimant's written argument or new information when reaching this decision.

FINDINGS OF FACT: (1) Supported Independent Services employed claimant as a direct support professional in a care facility from March 19, 2018 until December 10, 2018.

(2) The employer had an attendance policy that provided for the discharge of employees upon the accrual of eight attendance points. However, the employer generally did not discharge an employee under the attendance policy until the employee had received a written warning and been separately suspended from work for attendance violations. An employee would avoid accruing attendance points for an absence if the employee traded shifts and arranged for another employee to cover the absence. Claimant understood the employer's attendance policy and the accrual of attendance points.

(3) The employer also required employees to provide notification of absences by calling the employer and actually speaking with an employer representative. The employer prohibited giving notification by text message. However, claimant often communicated with the employer via text messages and was not aware that she should not give notice of an absence by text message.

(4) On November 26, 2018, the employer issued a written warning to claimant for having accrued 5.5 attendance points as of November 24, 2018. That warning advised claimant that she could be suspended if she accrued additional attendance points and was subject to discharge if she accrued more than 7.0 attendance points.

(5) On December 1 and 2, 2018, claimant was absent from work. As a result of these absences, claimant accrued two attendance points, which placed her total attendance points at 7.5. However, claimant was not discharged because she had not yet been placed on suspension for attendance violations. The employer suspended claimant from work on December 3 and 4, 2018 for her attendance violations.

(6) On December 8, 2018, the employer scheduled claimant to work. On that day, claimant was ill. Claimant had a fever and nausea, and was vomiting. Claimant later learned she had a severely abscessed wisdom tooth that required extraction. Claimant realized she was unable to work that day, and called the two coworkers for whom she had contact information to attempt to trade shifts with them and have them cover her scheduled shift. The coworkers declined. Claimant then called the facility in which she worked and asked if any coworkers there were willing to trade shifts with her. None of the coworkers agreed to trade shifts. Claimant contacted the employer by text message, informed the employer that she was unable to report for work and that she had not been able to find anyone to cover for her. The employer responded by text that if claimant or a coworker on her behalf did not report that day for her scheduled shift, the employer would discharge her for attendance issues. Claimant did not report for the shift due to illness and, at that point, accrued more points than allowed under the attendance policy.

(7) On December 8, 2018, the employer discharged claimant for having accrued more points than allowed under the employer's attendance policy.

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. Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b) (January 11, 2018). The employer carries the burden to show claimant's misconduct by preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, the employer raised three reasons for discharging claimant: that claimant had accrued more than the maximum number of attendance points allowed under its attendance policy; that claimant gave notice of her absence on December 8 by text message in violation of the employer's formal notification policy; and, that claimant did not make arrangements for a coworker to cover the shift to which she was unable to report. Each of these reasons is considered in turn.

With respect to claimant providing notice of her absence by text message, claimant's testimony that she was unaware of the employer's prohibition against notification by text was not challenged by the employer. Notably, the employer did not dispute that it regularly communicated with employees by text message, and the employer representative to whom claimant communicated her absence by text on December 8 did not question the means by which claimant made this notification, but engaged in a text exchange with claimant that day about the absence. In addition, the employer's witness at hearing testified that the employer likely would not have discharged claimant if her only alleged policy violation would have been that she communicated notice of her absence by text message. Audio at ~17:00. Because notifying the employer of her absence by text message on December 8 likely was not a proximate cause of claimant's discharge, it is not evaluated for purposes of determining if claimant is disqualified from benefits.

While the employer's position was that it discharged claimant on December 8, 2019 for exceeding the maximum allowable points under its attendance policy, EAB generally limits the misconduct analysis to the circumstances of the final absence. *See generally* June 27, 2005 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (where an individual is discharged under a point-based attendance policy, the last occurrence is considered the reason for the discharge). The facts surrounding the December 8 absence are properly the focus of the misconduct analysis.

With respect to why claimant was unable to attend work on December 8, the employer did not challenge that claimant was physically ill that day, only that she did not notify the employer that the absence was due to illness. It is not clear what difference it would have made to the employer to have known that illness prevented claimant from working that day since absences due to illness or other unavoidable circumstances are not excused under the employer's attendance policy unless they are authorized under the Oregon Sick Leave Law, of which there was no evidence that claimant's absence on December 8 was so authorized. Exhibit 2 at 18. Because OAR 471-030-0038(3)(b) specifically exempts absences due to illness from constituting misconduct, claimant's absence of December 8 was not for misconduct. OAR 471-030-0038(3)(b) does not require that a claimant must notify the employer that his or her absence arose from illness for the exemption to be applicable.

With respect to claimant's inability to arrange for a coworker to cover her shift on December 8, claimant made reasonable efforts to try to find coverage, including calling the only two coworkers for which she had contact information, as well as calling the house at which she worked to try to secure a replacement. To the extent it was reasonable for the employer to expect a sick employee to find coverage for herself, claimant took reasonably adequate steps to do so and did not manifest indifference to the employer's interests and staffing needs. On the facts in this record, claimant's inability to secure a replacement during her absence on December 8 was not a willful or wantonly negligent violation of the employer's standards, and did not constitute misconduct.

The employer did not meet its burden to show that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-124132 is affirmed.

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

DATE of Service: March 18, 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 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 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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