

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0229

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 # 140834). The employer filed a timely request for hearing. On November 16, 2018, ALJ Shoemake conducted a hearing, and on November 26, 2018, issued Order No. 18-UI-120224, affirming the Department's decision. On December 17, 2018, the employer filed an application for review with the Employment Appeals Board (EAB). On January 16, 2019, EAB issued Appeals Board Decision 2018-EAB-1155, reversing Order No. 18-UI-120224 and remanding the case to the Office of Administrative Hearings (OAH) for additional proceedings. On February 8, 2019, ALJ Shoemake conducted a remand hearing, and on February 14, 2019, issued Order No. 19-UI-124686, again affirming decision # 140834. On March 4, 2019, the employer filed an application for review of Order No. 19-UI-124686 with EAB.

EAB considered the employer's written arguments in reaching this decision.

FINDINGS OF FACT: (1) Daniel Robert Lang employed claimant from January 2, 2018 to August 14, 2018, last as a paralegal.

(2) The employer kept a paper master calendar where he noted his upcoming court and hearing appearances and other reminders. Occasionally, the employer put notations regarding claimant on the master calendar, including notations on days he had approved for claimant to miss work. Generally, only the employer put notations on the master calendar. Other than in July 2018, the employer required claimant to submit a "time off request form" to request days off work. Claimant understood the employer expected her to report for work unless she had approved time off work, and that the employer expected her to request days off from work using the time off request form. Claimant knew as a matter of common sense that the employer expected her to refrain from falsifying the master calendar.

(3) Unless he was out of the office, the owner required claimant to meet with him briefly when she arrived at work to discuss work priorities for the day, and to meet with him again before claimant left work each day to discuss the work she had completed that day.

(3) On April 11, 2018, the employer met with claimant and the director of claimant's paralegal program at the college claimant attended. The employer told claimant at the meeting that he was dissatisfied with claimant's lack of communication with him because she did not consistently meet with him at the beginning and end of each workday.¹

(4) On July 1, 2018, the employer met with claimant because he was promoting her from legal secretary to a paralegal position. They discussed the dates during July 2018 when claimant had preexisting appointments, and the employer told claimant he would approve those days off without claimant having to complete time off request forms for those dates. The employer understood that claimant had appointments on July 9, 16 and 30, and marked "KG gone" on those dates on the master calendar. Claimant understood that the employer had preapproved days off for her for July 9, 16, 23, and 30, and for August 13, 2018.

(5) On August 11, 2018, the employer was dissatisfied with claimant's performance because she did not check in with the employer when she reported to work. The employer was also dissatisfied when, later that day, he learned that claimant planned to miss work on August 13, 2018. Claimant told the employer he had previously approved her taking August 13 off work, but the employer disagreed that he had approved claimant taking August 13 off work. The employer told claimant he expected her to work on August 13 to help prepare for a hearing the morning of August 14, 2018. Claimant told the employer she was leaving town to attend a concert on August 12, 2018. The employer gave claimant the option of working on August 12 before she left town or on August 13 after she returned home from the concert to prepare for the hearing. Claimant told the employer she would not work on August 12, but offered to work on August 13 after she returned home. The employer told claimant that she was suspended from work, and directed her to contact the employer after August 13 before she reported back to work.

(6) After he spoke with claimant on August 11, 2018, the employer reviewed his master calendar and saw that "KG gone" was written on the master calendar spaces for August 13, 2018 and July 23, 2018. Audio Record at 13:41 to 14:13, EAB Exhibit 1. The two notations appeared to the employer to be in claimant's handwriting and not his own.

(7) Claimant did not report to work or contact the employer on August 12 or 13, 2018.

(8) On August 14, 2018, the employer discharged claimant because she did not report to work on August 13, 2018 and because she allegedly falsified the employer's master calendar by writing "KG gone" on the calendar for July 23 and August 13, 2018.

CONCLUSIONS AND REASONS: The employer discharged claimant, not for misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits because of this work separation.

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

¹ EAB Exhibit 1 at 7.

amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471030-0038(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 asserted that he discharged claimant because she failed to meet with him at the beginning of the workday on August 11, and because she forged entries on his calendar and was insubordinate in failing to report to work on August 13. However, the record shows that the employer put claimant on a disciplinary suspension on August 11 and did not discharge her until after claimant failed to report to work on August 13 and the employer found the allegedly forged calendar entries. Had the employer believed claimant's failure to meet with him the morning of August 11 alone warranted discharge, the employer likely would have discharged claimant on August 11. Accordingly, claimant's failure to meet with the employer the morning of August 11 was not the proximate cause of the employer's decision to discharge claimant.

The employer did not decide to discharge claimant until he found the allegedly forged calendar entries, and claimant failed to report to work on August 13. Those proximate causes of the employer's decision to discharge claimant must be examined to determine whether claimant's discharge was for misconduct. Only if claimant's conduct regarding the calendar or her failure to report to work on August 13 was willful or wantonly negligent would it then be appropriate to analyze claimant's other alleged willful or wantonly negligent behavior. The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

With respect to the employer's contention that claimant forged the "KG gone" entries on his master calendar for July 23 and August 13, the preponderance of the evidence does not show that claimant engaged in that misconduct. The employer's recollection was that he had approved only July 9, 16 and 30 off work for claimant during July 2018, and that he had not discussed claimant's days off in August 2018 with her.² To request days off after July 2018, the employer expected her to complete a time off request form. The employer also provided evidence of his opinion that the "KG gone" notations on his calendar for July 23 and August 13 were in claimant's handwriting, and were not his handwriting.³ However, the employer's evidence does not outweigh claimant's evidence that she did not falsify the employer's master calendar. Claimant denied that she ever wrote her days off work on the employer's master calendar, and testified that she saw the employer write, "KG gone," on the Mondays, July 9, 16, 30 and July 23.⁴ Claimant also testified that during the same meeting in early July when the employer approved the Mondays off during July, she told the employer she had plans for August 13, and he acknowledged it, leading claimant to assume that she did not have to complete a time off request form for August 13.⁵ The employer's evidence of claimant's alleged forgery did not outweigh claimant's

² Transcript (February 8, 2019) at 17, 48.

³ Transcript (February 8, 2019) at 5-6, 8-9, 46-49; *see also* exhibits 1, 2, 4A, 4B, 6C.

⁴ Transcript (February 8, 2019) at 32-33.

⁵ Transcript (February 8, 2019) at 34-35.

evidence that she did not engage in forgery, including her assertion that the disputed notations on the calendar looked to her like the employer's handwriting.⁶ Where the evidence is equally balanced, the party with the burden of persuasion, here, the employer, has failed to satisfy its evidentiary burden. Consequently, the employer failed to establish claimant engaged in misconduct by forging the notations on the employer's calendar.

The employer asserted that claimant violated the employer's expectation that she work when he scheduled her to work. There are two reasons why the record does not show that claimant engaged in misconduct in that regard. First, claimant testified that she offered to work on August 13, but the employer instead put her on disciplinary leave and told her to contact him again on August 15.⁷ The preponderance of the evidence does not show that claimant refused to work on August 13 where claimant's testimony is equally as persuasive as the employer's that she offered to work but was put on suspension instead. Second, although the employer apparently expected claimant to report to work on August 13 despite his having put her on suspension, the record does not show that claimant knew or should have known that he expected her to work despite having been suspended from work until August 15.

The conduct that triggered the employer's decision to discharge claimant was not willful or wantonly negligent misconduct. Claimant's discharge was, therefore, not for misconduct. Having so concluded, we need not analyze the employer's allegation that claimant willfully or with wanton negligence failed to meet with him the morning of August 11.

DECISION: Order No. 19-UI-124686 is affirmed.

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

DATE of Service: April 10, 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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⁶ Transcript (February 8, 2019) at 33.

⁷ Transcript (February 8, 2019) at 37.



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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