

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0257

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 17, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 163000). The employer filed a timely request for hearing. On March 4, 2019, ALJ Shoemake conducted a hearing, and on March 8, 2019, issued Order No. 19-UI-126045, affirming the Department's decision. On March 12, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Comforcare Hillsboro McMinnville employed claimant from September 26, 2018 until December 14, 2018 as a registered nurse (RN).

(2) The employer prohibited employees from falsifying employee timecards and expected claimant to report to work when scheduled unless the employer gave her permission to miss work. Claimant understood the employer's policies.

(3) On December 7, 2018, claimant's manager met with claimant because claimant had not yet completed an incident report for an alleged medication error. Claimant completed the report with the manager at that time. The manager also discussed concerns regarding claimant's attendance and an incident when claimant had allegedly inappropriately touched a client.

(4) On December 11, 2018, the employer had approved claimant missing the first half of her shift. Before claimant reported to work for her shift on December 11, 2018, she was involved in a motor vehicle accident. A police officer at the scene assisted claimant with calling the employer. The employer told claimant she did not have to report to work for the remainder of her shift.

(5) On December 12 and 13, 2018, the employer gave claimant permission to miss work due to her accident.

(6) Sometime before December 14, 2018, the employer found the evidence inconclusive regarding the alleged incident of inappropriate touching it had discussed with claimant on December 7, 2018.

(7) On December 14, 2018, claimant called the employer before her shift, and the employer told her to report to work at 10:00 a.m. Claimant's shift normally began at 9:00 a.m. Although claimant arrived at work at 10:00 a.m., she put on her timecard that she arrived at work at 9:00 a.m. Claimant did not recall having put that she arrived at 9:00 a.m. on her timecard, and thought she had put 10:00 a.m. on her timecard.

(8) On December 14, 2018, the employer discharged claimant for alleged attendance violations and putting the incorrect starting time on her timecard for December 14, 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) (December 23, 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 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. Absences due to illnesses are not misconduct under OAR 471-030-0038(3)(b).

The employer's witness asserted that it would have discharged claimant even had she not put the wrong starting time on her timecard for December 14, 2018 because of multiple attendance violations and other incidents that occurred before December 7, 2018. Transcript at 9. However, the record shows that the employer met with claimant and counseled her on December 7, 2018, and did not discharge her until after claimant failed to report to work on December 11, 12 and 13, and after claimant entered her start time one hour earlier than she started work on December 14, 2018. Had the employer believed the incidents it discussed with her on December 7 by themselves warranted discharge, the employer likely would have discharged claimant on December 7. Accordingly, the incidents that occurred prior to December 7, 2018 were not the proximate causes of the employer's decision to discharge claimant.

Because the employer did not decide to discharge claimant until claimant missed work on December 11, 12 and 13, and put one extra hour of work, that she did not work, on her timecard for December 14, those proximate causes of the employer's decision to discharge claimant must be examined to determine whether claimant's discharge was for misconduct. 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).

The evidence presented by both parties regarding whether claimant had permission to miss work on December 11, 12 and 13 was in conflict, and the employer's evidence did not outweigh claimant's firsthand testimony that she had permission to miss work after she was injured in a car accident. The record does not contain evidence showing either party's witnesses were not credible. Therefore, the evidence about whether claimant had permission to miss work was no better than equally

balanced, and the party with the burden of persuasion, the employer, has failed to show by a preponderance of the evidence that claimant did not have permission to miss work on December 11, 12 or 13. The employer therefore did not show that misconduct occurred with respect to claimant's attendance during her last week of employment. Even assuming that the employer did not give claimant permission to miss work on December 11, 12 and 13, because claimant was injured in a car accident on December 11, the employer's expectation was not reasonable that claimant maintain her normal work schedule if she was unable to work due to injury.

To the extent the employer discharged claimant because she put that she began work at 9:00 a.m. rather than the correct time of 10:00 a.m. on her timecard for December 14, the employer did not show claimant engaged in misconduct. Claimant testified that she did not remember marking that she began work at 9:00 a.m., and thought she put 10:00 a.m. Transcript at 19. The record does not show that claimant deliberately or with willful intent falsified her timecard for December 14, 2018. Nor does the record show that claimant acted with wanton negligence in completing her timecard. Violations of an employer's standards that result from an inadvertent failure to pay attention, a lapse, an oversight, a mistake or the like generally are not accompanied by the consciously aware mental state required to show that a claimant's behavior was wantonly negligent. *See* OAR 471-030-0038(3)(a). On the facts in this record, the employer did not show that claimant's behavior in putting the wrong start time on her time card for December 14 was a willful or wantonly negligent act, or that it constituted misconduct.

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

DECISION: Order No. 19-UI-126045 is affirmed.

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

DATE of Service: April 16, 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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