

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0293

Modified
Disqualification – Effective Week 50-18

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 # 152451). The employer filed a timely request for hearing. On March 1, 2019, ALJ Snyder conducted a hearing at which claimant failed to appear, and on March 8, 2019, issued Order No. 19-UI-126024, concluding the employer discharged claimant for misconduct. On March 20, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: Accompanying its request for hearing, the employer submitted several documents for consideration. The ALJ marked those documents as “Record” documents. The employer’s witness testified about portions of one of those “Record” documents at hearing, the employer’s December 8, 2018 “Notice of Removal,” which stated the claimant’s removal from the United States Postal Service was “effective December 09, 2018.” OAR 471-041-0090(1) (October 29, 2006) provides that EAB may consider information not received into evidence at the hearing if necessary to complete the record. The December 8, 2018 “Notice of Removal” is relevant to establishing the effective date of claimant’s discharge and its admission into evidence is necessary to complete the record in this case. Accordingly, that document, marked as EAB Exhibit 1, is admitted into the record. Any party that objects to the admission of EAB Exhibit 1 into the record must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090. Unless such objection is received and sustained, EAB Exhibit 1 will remain in the record.

WRITEN ARGUMENT: Claimant submitted written argument to EAB, but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record and is construed as a request to have EAB consider new information under OAR 471-041-0090(2), which allows EAB to consider information not presented at the hearing if the party offering the information shows it was prevented by circumstances beyond its reasonable control from doing so. The record shows

that OAH mailed notice of the hearing to claimant at his address of record with the Department. Accordingly, it is presumed that claimant received notice of the hearing. Claimant did not explain why he failed to appear for the hearing or otherwise show why he could not have offered the new information for consideration prior to the hearing. Because claimant did not show that circumstances beyond his reasonable control prevented him from presenting the information at the hearing, claimant's request to have EAB consider the new information is denied. For these reasons, we considered only information received into the record at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) The United States Postal Service employed claimant as a mail processing clerk from 2009 to December 9, 2018.

(2) On April 13, 2018, the employer issued to claimant a "Notice of Removal" from the employer for excessive absenteeism, and suspended claimant from work. EAB Exhibit 1. Claimant filed grievance through his union to appeal the "Notice of Removal."

(3) On June 28, 2018, claimant, his union and the employer entered into a "Last Chance Agreement" (LCA) to settle claimant's grievance. EAB Exhibit 1. The agreement allowed claimant to return to work but required him to work in "trial status" for two years, which meant that any violation of the LCA would constitute cause for his termination from employment. Audio Record ~ 11:00 to 12:00. Under the terms of the LCA, claimant was not allowed to accrue more than 16 hours of unscheduled absences during any ninety-day period within the two-year trial status period, nor was he allowed to have an absence without leave (AWOL) during the entire trial status period. The LCA provided that any failure on claimant's part to report an absence in accordance with the employer's absence reporting requirement or submit satisfactory documentation in support of an absence would result in the absence being classified as AWOL. Claimant was aware of the employer's expectations contained in the LCA.

(4) Claimant suffered from a chronic illness for which he obtained from the employer protected leave under the Family and Medical Leave Act (FMLA). On November 9, 2018, the employer notified claimant that he had reached his maximum yearly allotment of 480 hours of FMLA protection for the year and that further unscheduled absences for his condition during the year would be unprotected under FMLA.

(5) On November 10, 2018, claimant called in sick and was absent from work for 8 hours. Claimant did not provide any documentation of in support of his absence, which resulted in the work hours missed being classified as AWOL.

(6) On November 13, 2018, claimant reported 3.37 hours late to work, and failed to call in as required or submit any documentation in support of the absence which resulted in the work hours missed being classified as AWOL.

(7) On November 14, 2018, claimant called in sick and was absent from work for 8 hours. Claimant did not provide any documentation of in support of his absence, which resulted in the work hours missed being classified as AWOL.

(8) On November 15, 2018, claimant reported 1.7 hours late to work, and failed to call in as required or submit any documentation in support of the absence, which resulted in the work hours missed being classified as AWOL.

(9) On November 16, 2018, claimant called in sick and was absent from work for 8 hours. Claimant did not provide any documentation in support of his absence, which resulted in the work hours missed being classified as AWOL.

(10) On November 17, 2018, claimant reported for work 1.58 hours after his assigned start time of 4:00 a.m. He failed to call or otherwise notify management that he was going to be late or absent during that period or submit any documentation in support of his absence in violation of the LCA. When interviewed on November 28, 2018, claimant admitted that on November 17, 2018 he was AWOL under the terms of the LCA and violated the LCA. EAB Exhibit 1. On December 8, 2018, after completing its investigation, the employer discharged claimant, effective December 9, 2018, for that reason.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for violating his LCA by reporting late for work on November 17, 2018 without calling in to report it or providing any documentation in support of his 1.58-hour absence. By admitting on November 28 that he was AWOL that day in violation of his LCA, claimant demonstrated that he was aware of the provisions of the LCA. By failing to call in to report that he would be late, provide any documentation to explain his absence after the fact, or take any other precautions to ensure that he was not late to work that day, claimant demonstrated that he was indifferent to the consequences of his conduct for the employer under circumstances where he knew or should have known that his actions or inaction would probably result in a violation of the requirements of his LCA. Accordingly, claimant's violation of the LCA on November 17, 2018 was at least wantonly negligent.

Claimant's LCA violation on November 17, 2018 cannot be excused as an isolated instance of poor judgment. To be isolated, the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Claimant knew or should have known after entering into the LCA on June 28, 2018 that failing to notify the employer about unscheduled absences from work or providing documentation

explaining them violated the terms of the agreement. His apparent decisions on at least five other occasions between November 9 and November 17, 2018 not to notify the employer about unscheduled absences from work or provide documentation explaining them demonstrated his indifference to the consequences of his actions for the employer and were at least wantonly negligent. Claimant's violation of the LCA on November 17, 2018 therefore was part of a pattern of willful or wantonly negligent behavior, and not a single or infrequent occurrence.

Claimant's failure to report for work as scheduled on November 17, 2018 without calling in or providing documentation in support of his absence was not the result of a good faith error in his understanding of the employer's expectations. Claimant was represented by a union representative when he entered into the LCA in settlement of his grievance on June 28, 2018, and more likely than not understood the absence reporting requirements contained therein. His failure to comply with those requirements in November of 2018 was not the result of an error in his understanding of the employer's expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits until he has earned four times his weekly benefit amount from work in subject employment. Order No. 19-UI-126024 is modified to change the effective week of the order from week 49-18 to 50-18.

DECISION: Order No. 19-UI-126024 is modified, as outlined above.

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

DATE of Service: April 24, 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

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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