

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0333

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 14, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 115808). Claimant filed a timely request for hearing. On March 14, 2019, ALJ Janzen conducted a hearing, and on March 15, 2019 issued Order No. 19-UI-126502, concluding that the employer discharged claimant for misconduct. On April 1, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information not offered into evidence during the March 14th hearing. Claimant did not show as required by OAR 471-041-0090(2) (October 29, 2006) that factors or circumstances beyond his reasonable control prevented him from offering the new information at the hearing. For this reason, claimant's new information was not considered when reaching this decision.

FINDINGS OF FACT: (1) Restaurants Unlimited Inc. employed claimant as an expeditor in its restaurant kitchen from approximately November 1, 2018 until December 26, 2018.

(2) The employer expected employees to report for work as scheduled unless they took certain designated steps. If an employee did not want to work a scheduled shift, the employee was required to access "Hot Schedules," the employer's online scheduling application, and release the shift on the application so that it could be picked up by another employee. If a manager approved the substitution of the employee desiring to pick up the shift, the initially scheduled employee was relieved of responsibility for that shift. Claimant understood the employer's expectations.

(3) Sometime before December 17 or 18, 2018, claimant was scheduled to work on December 21, 22, 23, 24 and 25, 2018. On December 17 or 18, 2018, claimant met with the general manager and told the manager, among other things, that he did not want to work those shifts. The general manager told claimant that he did not need to work if he got the shifts covered by other employees in Hot Schedules.

(4) Sometime before December 21, 2018, claimant accessed Hot Schedules and thought he released the shifts for which he was scheduled on December 21, 22, 23, 24 and 25. However, the employee whom claimant believed picked up the shifts for December 24 and 25, 2018 did not report for work in place of claimant.

(5) Around approximately December 26, 2018, the employer discharged claimant for failing to report for work as scheduled on December 24 and 25, 2018.

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) (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 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. The employer has the burden to establish 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-126502, it was concluded that the employer discharged claimant for misconduct. While the order noted that claimant testified that he believed he had released all the shifts for which he was scheduled, it reasoned that the testimony of the employer's witness that claimant had not done so was more reliable. In discounting claimant's testimony, the order relied on claimant's inability to specifically recall whether he was scheduled to work on any day other than Christmas Day, December 25, 2018. Order No. 19-UI-126502 at 4. In finding the testimony of the employer's witness more reliable, the order relied on the employer's witness having "presented clear, unambiguous testimony utilizing the employer's schedul[ing] application [Hot Schedules]." Order No. 19-UI-126502 at 4. The testimony that was offered by that witness was that the employer had scheduled claimant for shifts on December 21, 24, and 25, 2018, that claimant failed to report on those days, and that claimant failed to ensure that someone covered his shifts. Order No. 19-UI-126502 at 4. However, Order No. 19-UI-126502 failed to rule out that claimant tried to release the shifts at issue on the Hot Schedules, thought he had done so, but through an inadvertent error or mistake did not successfully achieve that result.

It is understandable that claimant was unable to recall the specific days around Christmas 2018 that he was scheduled to work other than Christmas Day. The holiday season was three months before the hearing, and claimant's inability to remember the specifics of his work schedule from around that time does not significantly undercut, let alone defeat, the certainty of his belief that he released all of the shifts for which he was scheduled to work around Christmas 2018. Transcript at 29, 31, 33. Claimant's insistence that he had released those shifts was adamant and seemed sincere. While the employer's witnesses testified that Hot Schedules did not show that claimant actually released his any of the shifts at issue, she could not rule out that claimant accessed Hot Schedules and mistakenly thought that he had released all of the shifts at issue.

We therefore find the evidence equally balanced as to whether claimant tried to release the shifts at issue, but through some oversight, mistake or error failed to achieve that end. Violations of an employer's standards that result from a failure to pay attention, a lapse, an inadvertent oversight, a mistake, an accident or the like are not accompanied by the consciously aware mental state required to show that a claimant's behavior was willful or wantonly negligent. *See* OAR 471-030-0038(3)(a). The record therefore fails to show that claimant's failure to release the shifts at issue, arrange for another employee to pick up those shifts or to report for those shifts was the result of willful or wantonly negligent behavior.

The employer did not establish that claimant was discharged for misconduct. Claimant is not disqualified from unemployment insurance benefits based on his work separation from the employer.

DECISION: Order No. 19-UI-126502 is set aside, as outlined above.

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

DATE of Service: May 2, 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 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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