

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0341

Reversed
Disqualification

PROCEDURAL HISTORY: On January 30, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 85747). Claimant filed a timely request for hearing. On March 12, 2019, ALJ Monroe conducted a hearing at which claimant did not appear, and on March 15, 2019 issued Order No. 19-UI-126494, affirming the Department's decision. On April 4, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Sometime before September 24, 2018, Express Employment Professionals began hiring claimant to work on assignments for its clients. Express Professionals was a temporary staffing agency.

(2) The employer expected claimant to report to his assignments on time and as scheduled. If claimant was going to be late or absent, the employer further expected claimant to notify the employer or the client to which he was assigned before the start of the shift. Claimant understood the employer's expectations.

(3) On October 2, 2018, claimant called the employer stating that he would be late for his assignment, but never reported to the assignment. On October 3, 2018, the employer met with claimant and warned him that he needed to comply with the employer's attendance policy and to provide notice if he was going to be absent. On October 8, 2018, claimant reported late to work. As of October 23, 2018, claimant had missed several days of assigned work and had been coached multiple times about the requirements of the attendance and notification policies.

(4) On November 6, 2018, claimant did not report for an assignment and did not notify the employer or the client that he would be absent. When the employer contacted claimant later about his absence, claimant was warned that further attendance issues on assignments could result in his discharge.

(5) On November 12, 2018, claimant began a new assignment performing production work for one of the employer's clients, Meggitt. On December 10, 2018, claimant failed to report for work on time

because his ride did not appear to pick him up. Claimant did not notify the employer or client before the start of the shift that he was going to be late. On December 12, 2018, claimant did not report for work, and did not notify the employer until five hours after the start of his shift. Later that day, the employer, not claimant, notified Meggitt of claimant's absence that day.

(6) On December 19, 2018, claimant was late reporting for work. That same day, claimant did not return to work after his lunch break, and Meggitt informed the employer that it was ending claimant's assignment effective that day. Meggitt advised the employer that claimant had chronic attendance issues during the assignment, reported late to work every day, and regularly fell asleep during his shift. The employer discharged claimant on December 19, 2018.

CONCLUSIONS AND REASONS: 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) (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.

Order No. 19-UI-126494 concluded that, given the many prior counselings claimant had received from the employer, claimant's failure to report on time for his shift on December 19, 2018 and failure to return to work after his lunch break was at least wantonly negligent behavior in violation of the employer's standards. Order No. 19-UI-126494 at 4. However, Order No. 19-UI-126494 further concluded that claimant's wantonly negligent behavior was excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b) because the employer did not show that claimant's behavior on December 19 was part of a pattern of other willful or wantonly negligent behavior. Order No. 19-UI-126494 at 4. However, the weight of the evidence in the record does not establish that claimant's behavior should be excused as an isolated instance of poor judgment.

At the outset, Order No. 19-UI-126494 correctly concluded that claimant's behavior on December 19 was a wantonly negligent violation of the employer's standards. Claimant had been coached several times before that day on the employer's attendance policy and had been warned that any further violations might result in his discharge. There is no evidence in the record from which to infer that claimant's tardiness and failure to return on December 19 likely were due to illness, exigent circumstances or factors beyond his reasonable control. Absent some basis for concluding otherwise, claimant's behavior on December 19 was at least a wantonly negligent violation of employer standards of which he was reasonably aware.

Claimant's behavior on December 19 should not have been excused from misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior is properly excused as an isolated instance of poor judgment only if, among other things, it is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). While Order No. 19-UI-126494 reasoned that claimant's absence on December 12 was due to illness and could not constitute prior willful or wantonly negligent conduct, the order did not consider that claimant also failed to notify the employer or the client of the absence as required under the employer's policy. Order No. 19-UI-126494 at 4. Absent evidence to the contrary, that failure to notify was a wantonly

negligent violation of the employer's standards that preceded claimant's behavior on December 19. As well, absent evidence to the contrary, claimant's behaviors in not reporting for work and failing to provide notice on October 2 and November 6 were also wantonly negligent violations of the employer's standards. Although claimant was working on those days on a different assignment for a client other than Meggitt and, technically, those violations occurred in a different employment relationship, they involved the same employer and the same attendance policy requirements. *See* OAR 471-030-0038(1)(a) (when an individual works for a temporary agency, the work relationship is severed when the work assignment ends). Under these circumstances, there does not appear to be sound basis for ignoring these past violations. Accordingly, because claimant's wantonly negligent behavior on December 19 was not a single or infrequent violation of the employer's standards, it may not be excused from constituting misconduct as an isolated instance of poor judgment.

While claimant's wantonly negligent behavior on December 19 may also be excused from constituting misconduct if it was a good faith error under OAR 471-030-0038(3)(b), there is insufficient evidence to find that this excuse is applicable. The preponderance of the evidence does not show that claimant likely was late or absent without notice because he misunderstood the employer's policy or because he thought the employer would allow him to do so despite its attendance policy. Claimant's wantonly negligent behavior on December 19 is not excused as a good faith error.

The employer discharged claimant for unexcused misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-126494 is set aside, as outlined above.

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

DATE of Service: May 9, 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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