EO: 200
BYE: 201910

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0363

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 13, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 75018). Claimant filed a timely request for hearing. On March 29, 2019, ALJ M. Davis conducted a hearing, and on April 1, 2019 issued Order No. 19-UI-127356, concluding that claimant's discharge was not for misconduct. On April 15, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that contained information not received into evidence during the hearing, including documents showing the days that claimant was absent or reported late for work, and text messages he sent to notify the employer of those absences and tardy arrivals. OAR 471-041-0090(2) (October 29, 2006) allows EAB to consider new information if, among other things, it is relevant and material to the issues before EAB on review. However, the number of days claimant was absent and late and the text messages he sent to the employer about his absences and tardy arrivals was not disputed at hearing. As discussed below, the principal issue on review is whether claimant's conduct regarding his final absence from work on February 12, 2019 was a willful or wantonly negligent violation of the employer's reasonable expectations. The employer's new information is not material to that issue. EAB therefore did not consider the employer's new information when reaching this decision.

FINDINGS OF FACT: (1) JMAK Investments doing business as Action Rent-All & Events employed claimant as a mechanic's helper from July 2, 2018 until February 13, 2019.

(2) The employer's written policies required employees to notify a supervisor or other employer representative of an absence from work by speaking in live-time to the supervisor or representative. The employer interpreted this policy to prohibit notification by text or voicemail message. However, claimant was unaware of the written policy, often notified the employer of absences by text message, and the employer never informed claimant that notification by text message was unacceptable or violated its written policies.

(3) On November 28, 2018, the employer informed claimant that he had missed 47 days of work since he was hired, and if he continued to be absent excessively he could be discharged.

(4) On January 8, 2019 at 8:42 a.m., claimant sent a text message to his supervisor stating that he was not at work because he was seeking treatment at a hospital emergency department due to metal flakes getting into his eyes. On January 15, 2019, claimant notified his supervisor by text message that he was not at work because he had been given a wrong part to repair his car, but he thought he would be in around 1:30 p.m. On January 24, 2019, claimant notified his supervisor by text message that he was absent from work because his medication had gotten mixed up with his girlfriend's medication, and he had a bad reaction. On none of these days did the supervisor tell claimant that he was prohibited from giving notice by text message.

(5) On January 29, 2019, the employer gave claimant a warning for missing an excessive amount of work. The employer understood that it communicated to claimant that he might be discharged if he continued to miss work. The employer did not communicate to claimant that he was prohibited from notifying the employer of an absence by text or voicemail message, and that he needed to inform the employer in a live-time voice communication of any absence.

(6) On February 12, 2018, claimant had an appointment with a dentist to have a wisdom tooth extracted. Claimant had forgotten to notify the employer in advance that he needed time off for the appointment. Early that morning, at 6:10 a.m., claimant sent a text message to his supervisor notifying him of the appointment and stating that he thought he would be able to report for work at noon that day.

(7) As part of the tooth extraction, anesthesia was administered to claimant and, and he was given pain medication immediately after the extraction. As result, claimant did not think it would be safe for him to drive to work or perform any work. At around 12:34 p.m., claimant called the employer's main office and left a voice message stating that he was not able to report for work at noon as he had thought. At approximately 4:14 p.m., claimant sent a text message to his supervisor stating that his tooth had been pulled, and he was dizzy and would not be able to report for work until the next day.

(8) On February 13, 2019, the employer discharged claimant for his conduct regarding his absence from work on February 12.

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 misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, the employer's witness stated that the employer discharged claimant because of excessive absences and lateness, and testified about claimant's many absences before the final one on February 12, 2019. Audio at ~7:13. However, the cumulative total of a claimant's alleged prior violations of the employer's expectations are generally not considered in determining if claimant was discharged for misconduct. Instead, the focus is on the final incident of alleged misconduct since it was the event that triggered the discharge. Where, as here, the employer was aware of claimant's prior absences but did not discharge him until after his final absence, it is inferred that the employer did not consider the prior absences sufficiently serious to warrant discharge. Thus, claimant's absence on February 12 and the circumstances surrounding it are the proper focus of the misconduct analysis.

Although should have notified the employer in advance that he had a dental appointment scheduled for February 12, 2019, he testified that he "completely spaced out about it" and forgot to give notice. Audio at ~18:30. Absent a preponderance of evidence showing that claimant consciously neglected to give advance notice, the record fails to show that his failure to do so was willful or wantonly negligent. The evidence in the record did not indicate that claimant was aware that keeping the dental appointment without giving advance notice was likely to or would impose an unreasonable burden on the employer. Nor does it appear that by keeping the dental appointment in lieu of reporting for work, claimant was acting with indifference to the employer's interests or knew or should have known that he probably was violating the employer's standards, particularly since claimant's absence from work apparently was due to a medically necessary procedure. On this record, claimant's absence from work for a single day for a medical reason and his failure to give advance notice of that absence were not willful or wantonly negligent violations of the employer's standards.

The employer's witness testified that claimant violated the employer's expectations by giving notice of his that he would be late, and later absent, by text message, and that claimant should have been aware of the employer's expectations because they were stated in the employer's handbook and hiring paperwork. Audio at ~8:26. However, claimant testified that that he was never aware of such a policy and had been giving notification of absences by text message to his supervisor since he was hired. Audio at ~10:24, ~16:33, ~16:54; Audio at ~17:05, ~17:15. Claimant's testimony was corroborated by his supervisor's testimony regarding claimant's prior absences, which did not indicate that supervisor had commented at all on claimant giving notification by text message, let alone that he objected to that form of notice. Audio at ~12:17 *et seq*. Claimant's testimony also was corroborated by the supervisor's testimony that he did not inform claimant that notifications via text message were prohibited when they discussed the warning issued to claimant on January 29, 2019. Audio at ~14:50. Absent a preponderance of evidence showing that claimant knew or should have known that giving notice by text probably violated the employer's expectations, the record fails to establish that claimant violated the employer's expectations willfully or with wanton negligence.

The employer did not meet its burden to show that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-127356 is affirmed.

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

DATE of Service: May 20, 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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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