

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0388

Reversed
Disqualification

PROCEDURAL HISTORY: On February 22, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 105018). Claimant filed a timely request for hearing. On March 25, 2019, ALJ Wyatt conducted a hearing, and on April 2, 2019, issued Order No. 19-UI-127468, concluding the employer discharged claimant, but not for misconduct. On April 19, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument in reaching this decision.

FINDINGS OF FACT: (1) Fred Meyer Stores Inc. employed claimant until January 20, 2019 as a customer greeter.

(2) The employer expected employees to call a person in charge prior to a scheduled work shift if the employee was going to be absent from the shift. Exhibit 1. Claimant understood the employer's expectation.

(3) On August 29, 2018, claimant failed to report to work for a scheduled shift and did not call a person in charge before her shift to report that she would be absent. Claimant knew she was scheduled to work, but did not report to work because she had a disagreement with a housemate who wanted her to move, and claimant was "going through a lot of things at the time." Audio Record at 26:28 to 27:00.

(4) On September 8, 2018, the employer suspended claimant from work for three days and gave claimant a written warning stating that claimant failed to notify personally a person in charge before her absence from work on August 29, 2018. Exhibit 1. The warning stated that a future violation of the same type could result in discharge from work. Exhibit 1. At the time of the warning, the employer also gave claimant, and claimant signed, a form listing claimant's responsibilities as an employee, including that the employer expected her to personally notify a person in charge before being absent from a scheduled shift.

(5) On January 16, 2019, claimant went to work but did not go into the store because she was “really upset” when she saw another employee working as a greeter at the door. Audio Record at 21:55 to 22:00. The employer had other employees who also worked as greeters. Claimant did not call a person in charge before her shift. After her shift began, claimant sent an email to a person in charge stating that she “[had] to move.” Audio Record at 24:48 to 24:58. Claimant was in the process of moving at the time. Claimant did not state in the email that she was upset about another employee working as a greeter.

(6) On January 20, 2019, the employer discharged claimant for failing to notify personally a person in charge before she missed her shift on January 16.

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. 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 order under review states that although claimant violated the employer’s attendance policy on August 29, 2018 and January 16, 2019, and claimant presented no evidence justifying her conduct, claimant’s conduct was excusable as an isolated instance of poor judgment because “claimant’s two violations, occurring several months apart, were infrequent occurrences and do not establish a pattern of willful or wantonly negligent behavior.” Order No. 19-UI-127468 at 3. The record shows that claimant understood the employer’s expectation that she call a person in charge before a shift if she was going to be absent. Claimant received the employer’s policy in the August 29 written warning, and claimant knew or should have known as a matter of common sense that the employer would want to know if an employee was going to be absent before the employee’s shift began. The record does not show that seeing another employee working as a greeter on January 16 was the type of circumstance that would reasonably prevent claimant from reporting to work. Claimant’s conduct in the final incident was therefore wantonly negligent.

The evidence developed at the hearing shows it is more likely than not that claimant’s conduct was not excusable as an isolated instance of poor judgment. OAR 471-030-0038(1)(d) defines an isolated instance of poor judgment as an act of “poor judgment” that is a “single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.” “Poor judgment” includes “a conscious decision to take action that results in a wantonly negligent violation of an employer’s reasonable standard of behavior.” OAR 471-030-0038(1)(d)(C).

Claimant's exercise of poor judgment in the final incident was not a single or infrequent occurrence. Less than five months earlier, on August 29, claimant failed to call a person in charge before her shift or report to work. The record does not show that the personal matter claimant was "going through" at the time prevented her from contacting a person in charge before her shift, or reporting to work. Claimant knew or should have known that failing to call and failing to report to work would probably violate the employer's expectations. Her conduct in that incident therefore was wantonly negligent.

Claimant therefore engaged in two wantonly negligent violations of the employer's policies within a five-month period, both of which involved claimant disregarding the employer's reasonable attendance expectation that she contact the employer before missing work. Her exercise of poor judgment in the final incident was not a "single or infrequent occurrence," it was, rather, a repeated wantonly negligent act. Claimant's conduct therefore was not "isolated," and it was not excusable as an isolated instance of poor judgment.

Claimant's behavior on January 16, 2019 also cannot be excused as a good faith error under OAR 471030-0038(3)(b). It is implausible that claimant sincerely believed that, after receiving the August 2018 warning and suspension, her conduct on January 16 complied with the employer's attendance expectations. There is no indication in the record that the employer would approve claimant missing work without notice because she was "upset" that another employee was working as a greeter, especially since other employees also performed that work.

The employer therefore discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 19-UI-127468 is set aside, as outlined above.

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

DATE of Service: May 22, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.



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.

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

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.