

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0469

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 22, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 160435). The employer filed a timely request for hearing. On April 26, 2019, ALJ Janzen conducted a hearing, and on April 29, 2019 issued Order No. 19-UI-128948, affirming the Department's decision. On May 17, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument to EAB. EAB did not consider the employer's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (October 29, 2006)).

FINDINGS OF FACT: (1) O'Reilly Auto Parts employed claimant as a store manager from January 7, 2013 until February 6, 2019.

(2) The employer expected that the manager assigned to open the store would report for work by 7:00 a.m. and open the store at the designated opening time of 7:30 a.m. Claimant understood the employer's expectations.

(3) On February 5, 2019, claimant was assigned to open the store. There was snow on the road that morning, but claimant left home in time to report for work at 7:00 a.m. and open the store at 7:30 a.m. despite the snow. However, when claimant reached the bridge that he needed to take to get to the workplace, traffic was stopped due to an accident on the bridge. Claimant was stuck on the bridge for 30 minutes waiting for the accident to be cleared. Claimant could not notify his manager that he was unable to open the store on time that morning because he had forgotten his cell phone at home. Claimant arrived late for work and opened the store five minutes late, at 7:35 a.m.

(4) On February 6, 2019, the employer discharged claimant for opening the store late on February 5, 2019.

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. “As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct.” OAR 471-030-0038(3)(a) (December 23, 2018). “[W]antonly negligent’ means 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.” OAR 471-030-0038(1)(c). The employer has the burden to show by a preponderance of the evidence that it discharged claimant for misconduct. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976) (in a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence).

At hearing, the employer’s witness testified about several instances prior to February 5 when claimant reported for work late or opened the store late. However, EAB customarily focuses on the final incident or the last act of alleged misconduct that occurred before the discharge to determine whether claimant is disqualified from benefits. This is because, absent evidence to the contrary, if the employer was aware of the incidents occurring before the final incident and did not discharge claimant for them, it presumably did not consider them sufficient to warrant discharge, and it was the occurrence of the final incident that caused the discharge. Claimant’s failure to report for work and open the store on time on February 5, 2019 is the proper focus of the misconduct analysis.

It is undisputed that claimant was late on February 5, 2019 and did not open the store on time in violation of the employer’s expectations. The issue for purposes of determining whether claimant is disqualified from benefits is whether his tardiness on February 5, 2019 and his failure to notify his supervisor of that tardiness was the result of willful or wantonly negligent behavior. The employer did not challenge that claimant left home in time to report for work at 7:00 a.m. and open the store at 7:30 a.m. despite the snow on the road. That claimant was late and unable to open the store on time was the result of an incident over which he had no control, the accident on the bridge. The record fails to show that claimant should have foreseen that an accident or some other delay might occur that morning on his way to work. Absent a showing that claimant consciously engaged in conduct that he knew or should have known would probably result in his failure to report for work and open the store on time, we cannot find that his failure to do so was willful or wantonly negligent.

As for claimant’s failure to notify his supervisor that he was going to be late that morning, the record fails to show that it was willful or wantonly negligent. Claimant failed to notify his supervisor because he forgot his cell phone. A claimant’s behavior that is inadvertent, the result of a lapse, forgetfulness, an accident, an oversight, a mistake or the like is not accompanied by the consciously aware mental state needed to establish willful or wantonly negligent behavior within the meaning of OAR 471-030-

0038(1)(e). On this record, the employer did not meet its burden to show that claimant's failure to notify his supervisor that he was going to be late constituted misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-128948 is affirmed.

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

DATE of Service: June 19, 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 desisyong ito.

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 សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារក្លាយៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

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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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