

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0700

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 20, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 152312). Claimant filed a timely request for hearing. On July 11, 2019, ALJ Janzen conducted a hearing, and on July 17, 2019 issued Order No. 19-UI-133488, concluding the employer discharged claimant, but not for misconduct. On July 29, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Winco Systems NEC Inc. employed claimant from June 24, 2011 until May 24, 2019, last as a customer service representative.

(2) The employer expected all employees to work the hours for which they were scheduled. Exhibit 2 at 41-42. The employer had a point-based attendance policy. If an employee was absent, tardy or left work early without permission, the employee accrued a specified number of occurrence points. An employee also accrued occurrence points if the employee failed to notify the employer of an absence or tardy two hours before the start of the employee's scheduled shift. An employee was subject to discharge if the employee accrued more than 15 occurrence points in a rolling twelve-month period. Claimant understood the employer's attendance policy.

(3) Claimant's shifts began at 8:00 a.m., except on Wednesdays, when the employer sometimes scheduled claimant to begin her shift at 7:30 a.m. On Wednesday, May 15, 2019, the employer had scheduled claimant to begin her shift at 7:30 a.m. Claimant customarily arrived at the workplace at 7:00 a.m. every day before her shift. On May 15, claimant arrived at the workplace at 7:00 a.m. She went to the break room to eat her breakfast before her shift. Claimant "just forgot" that it was "[her] 7:30 day and not [her] 8:00 day." Transcript at 23, 25. Believing she was on time for her shift, claimant clocked in at 7:59 a.m. to begin her shift. Claimant later realized she had clocked in late, and told her manager and the secretary. Claimant did not know the tardy would result in an accumulation of more than 15 total occurrence points.

(4) On May 24, 2019, the employer discharged claimant for accruing occurrence points that subjected her to discharge under the employer's attendance policy.

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). In a discharge case, 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).

Although the employer discharged claimant for exceeding the occurrence points allowed under its attendance policy, the proper initial focus of the misconduct analysis is claimant's tardiness for work on May 15, 2019. See generally June 27, 2005 Letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (where an individual is discharged under a point-based attendance policy, the last occurrence is considered the reason for the discharge). The first issue therefore is whether claimant's May 15 absence was due to willful or wantonly negligent behavior. Only if the final incident was due to a willful or wantonly negligent disregard of the employer's attendance expectations will prior alleged violations be considered to determine if the employer discharged claimant for misconduct.

The evidence did not show that claimant consciously disregarded the employer's expectation that she begin her shift on time on May 15, 2019. The record shows claimant forgot that it was a Wednesday, when the employer sometimes scheduled her to begin work at 7:30 a.m. Claimant was at the workplace, and would have been on time had her shift started at its more common start time of 8:00 a.m. Without more, violations of an employer's standards that result from forgetfulness, a lapse, or a mistake generally are not accompanied by the consciously aware mental state required to show that a claimant's behavior was willful or wantonly negligent. Merely showing that claimant was late for work on May 15 because she forgot it was Wednesday does not establish by a preponderance of the evidence that claimant's tardiness in the final incident was due to willful or wantonly negligent behavior.

The employer did not discharge for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 19-UI-133488 is affirmed.

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

DATE of Service: August 30, 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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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

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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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