

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0713

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 7, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81249). Claimant filed a timely request for hearing. On July 11, 2019, ALJ Scott conducted a hearing, and on July 12, 2019 issued Order No. 17-UI-133257, concluding that claimant's discharge was not for misconduct. On August 1, 2019, the employer filed an application for review with the Employment Appeals Board (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) (May 13, 2019).

FINDINGS OF FACT: (1) Ride Connection, Inc. employed claimant as a driver from April 8, 2019 until May 15, 2019.

(2) The employer provided transportation services for older adults and disabled individuals. The employer distributed manifests to drivers each afternoon setting out the times and locations at which each driver was scheduled to pick up passengers on the following day. The employer expected that drivers would arrive at the employer's headquarters each day in sufficient time to perform pre-trip inspections of their assigned vehicles, and arrive at their first pick-up location at the time shown on the manifest. Claimant understood the employer's expectations.

(3) On April 15, 2019, April 19, 2019, and April 30, 2019, claimant did not arrive at the headquarters in sufficient time to perform a pre-trip inspection and pick-up her first rider at the scheduled time. The

employer arranged and paid for private taxis to pick up the first scheduled riders that claimant had on April 19 and April 30. On April 19, the lead transportation manager and the lead worker spoke to claimant about arriving at the headquarters in sufficient time to perform a pre-trip inspection and pick-up her first riders of the day on time. The employer did not give claimant written warnings for her late arrivals on April 15, 19, and 30 because she was a new employee.

(4) On May 9, 2019, claimant called the lead transportation manager and told the manager that she was going to be late because she misread the manifest. The employer arranged and paid for a private taxi to pick up the first scheduled rider that claimant had that day.

(5) On May 14, 2019, the employer decided to discharge claimant on her next scheduled workday, May 15, 2019, because of her late arrivals to work.

(6) On May 14, 2019, claimant left work early to attend a funeral, before the employer distributed the manifests for May 15. After the funeral, claimant went to her adult son's apartment. When she arrived at the apartment, claimant saw that police and suicide intervention personnel were there. Claimant's son was suicidal and claimant thought he was about to attempt suicide. Claimant's mind was "just all kinds of crazy." Transcript at 30. Claimant went home later that night. Claimant pulled up on her computer the manifest for the next day, which the employer had emailed to her after she left work. However, claimant went to bed without reviewing the manifest. Claimant awakened on the morning of May 15 when an alarm went off on her computer. Claimant did not know where or when her first pick-up was that day. Claimant tried to access the manifest that she had pulled up, but was unable to do so. Claimant finally called the transportation manager. Claimant asked the manager if she was late for work. The manager told claimant that she was, and asked claimant to come to the headquarters.

(7) When claimant arrived at the headquarters on May 15, claimant did not explain to the transportation manager why she was late on that day. On that day, the transportation manager discharged claimant. Had claimant told the transportation manager about the circumstances that caused her not to review the manifest for May 15 and led to her being late on May 15, the transportation manager would not have discharged claimant.

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)

The employer's witness, the transportation manager, testified that the employer discharged claimant based on claimant's pattern of reporting late to work. Transcript at 10. However, the employer did not decide to discharge claimant until she was late on May 9, and would not have discharged claimant on May 15 if she had informed the employer of the family circumstances that led to her reporting late for work that day. Transcript at 17, 37. Claimant's late arrival to work on May 9 will be evaluated for misconduct since the employer was prepared to discharge her based on it before she was late again on May 15. Claimant's late arrival on May 15 will also be evaluated for misconduct because it involved a violation of the same employer standard as on May 9 and likely contributed to the employer's decision to discharge her on that day.

Claimant's lateness on May 9 resulted from having misread the manifest. Violations of an employer's standards that result from errors, mistakes, accidents, forgetfulness or the like generally are not accompanied by the consciously aware mental state required to show that a claimant's behavior was willful or wantonly negligent. *See* OAR 471-030-00038(1)(c), OAR 471-030-0038(3)(a). Without more, that claimant misread the manifest does not establish that her lateness on May 9 was the result of misconduct.

Claimant's lateness on May 15 likely resulted from distractions caused by the emergent situation involving the potential suicide of claimant's son the night before as well as problems accessing the manifest that morning, and not because claimant consciously engaged in conduct she knew or should have known would probably result in her being late, or because she was indifferent to the consequences of her actions. The distractions presumably resulted in claimant overlooking the need to review the manifest on the night of May 14 and take steps to ensure that she would arrive at work in time to perform her pre-trip inspection and pick up her first rider of the day at the scheduled time. The problems with the computer or claimant's email likely were unforeseen technical issues that led to claimant's inability to access the manifest when she awakened on May 15 and determine when she needed to be at work. Like mistakes and errors, violations of an employer standard due to forgetfulness, lapses, oversights, or unforeseen technical issues are generally also not accompanied by the consciously aware mental state required to establish that claimant's behavior was willful or wantonly negligent. Without more, the employer did not establish that claimant's lateness on May 15 resulted from misconduct.

The employer failed to establish that claimant's discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-133257 is affirmed.

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

DATE of Service: September 6, 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

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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