

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0763

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 6, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 75912). Claimant filed a timely request for hearing. On July 11, 2019, ALJ Snyder conducted a hearing, and on July 19, 2019 issued Order No. 19-UI-133718, affirming the Department's decision. On August 8, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which they contended that the hearing was not properly conducted and the order under review was biased. EAB reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4) and OAR 471-040-0025(1) (August 1, 2004). EAB did not consider the remainder of the claimant's 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) Laurelhurst Village employed claimant as a certified nursing assistant (CNA) from March 2018 until May 10, 2019. The employer's workplace was located in Portland, Oregon.

(2) The employer expected claimant to report for work on time and notify the employer if she was going to be absent. Claimant understood the employer's expectations.

(3) When hired, claimant lived in the Portland area. Sometime before May 6, 2019, claimant began staying at her mother's residence in The Dalles, Oregon and commuting to work from The Dalles. Claimant was not staying at her apartment in Portland because she did not feel comfortable around her male roommate. Claimant's roommate had Borderline Personality Disorder (BPD) and Obsessive Compulsive Disorder (OCD). The employer knew that claimant was commuting to work from The Dalles.

(4) On May 6, 2019, the employer scheduled claimant to work from 2:30 p.m. to 10:30 p.m. Because claimant had worked a night shift on May 5, 2019, she overslept her alarm on May 6. At around 1:30 p.m., claimant sent a text to the staffing coordinator and told him she was going to a few minutes late for her shift. Claimant then left The Dalles for Portland. Claimant thought she would report for work by 2:45 p.m.

(5) On May 6, at around 2:30 p.m., claimant arrived at her apartment in Portland. Claimant intended to change clothes, apply some make-up and proceed to work. However, claimant's roommate was in the apartment and became disruptive. The roommate yelled foul things at claimant, began breaking items in the apartment, and would not allow claimant to leave. Claimant was afraid for her safety, hid from the roommate, and sent a text message to her brother and asked him to call the police.

(6) The police arrived at the apartment and transported claimant to a "safe haven" location to protect her from the roommate. Audio Record at 23:55. The police had claimant stay at the location and took away her cell phone. Claimant told the police that she was missing work, but they stated that she should not go to work because the roommate knew her work location. During this time, the staffing coordinator was trying to contact claimant because she did not arrive at work shortly after 2:45 p.m. Lacking access to her phone, claimant did not know of the staffing coordinator's efforts to reach her and was unable to contact him or the employer if she wanted to. Sometime during the scheduled shift, claimant's brother phoned the employer, briefly described claimant's situation, and informed the employer that claimant was not able to report for the shift on May 6.

(7) On May 7, 2018, claimant was able to retrieve her cell phone and sent a text to the staffing coordinator explaining why she had not been able to report for work on May 6. In that text, claimant asked the staffing coordinator if she was supposed to work the night shift on May 7. The staffing coordinator did not promptly respond, and claimant proceeded to begin moving her belongings from the Portland apartment into a storage unit. At some point, claimant noticed that the staffing coordinator had texted her asking her to contact him. Claimant then sent a reply text to the coordinator apologizing for missing his text and asking again if she was working that night. The coordinator texted claimant that she was not scheduled to work, that he would call claimant the next day, and that he wanted claimant to answer his call. However, the coordinator did not call claimant as he stated he would.

(8) On May 10, 2019, the employer discharged claimant for not reporting to work on May 6, 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). 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).

Order No. 19-UI-133718 concluded that the employer discharged claimant for misconduct. The order found that the employer discharged claimant for failing to call the staffing coordinator in response to his text of May 7, as well as for missing work on May 6. Order No. 19-UI-133718 at 2. The order reasoned that claimant's behavior in failing to communicate with the staffing coordinator was wantonly negligent. Order No. 19-UI-133718. The order did not include findings or conclusions as to whether claimant's behavior in failing to report for work on May 6 was willful or wantonly negligent. The record does not support the conclusion that the employer discharged for misconduct.

At the outset, the employer's hearing witness, the staffing coordinator, did not testify that the employer discharged claimant for failing to communicate with him by voice in response to his May 7 text. The staffing coordinator limited his testimony about the reasons that the employer discharged claimant to her failure to report for work on May 6. Audio Record at 10:16 to 12:30, 28:11 to 28:51; 29:15 to 29:56. The staffing coordinator candidly admitted that had claimant merely been tardy on May 6, rather than missing the entire shift, the employer likely would not have discharged her. Audio Record at 29:15 to 29:56. The record shows that the proximate cause of claimant's discharge was her absence from work on May 6.

The staffing coordinator did not dispute claimant's account of the circumstances that prevented her from reporting for work on May 6. Those circumstances were plainly exigent and beyond claimant's reasonable control. The evidence does not support that claimant's absence from work on May 6 arose from a willful disregard of the employer's standards, a conscious indifference to the employer's expectations or a conscious choice that she knew or should have known would probably violate the employer's standards. The employer did not show that claimant's behavior on May 6 constituted misconduct.

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

DECISION: Order No. 19-UI-133718 is set aside, as outlined above.

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

DATE of Service: September 12, 2019

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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