

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0853

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 26, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 101819). Claimant filed a timely request for hearing. On August 22, 2019, ALJ Snyder conducted a hearing, and on August 29, 2019, issued Order No. 19-UI-135798, concluding that the employer discharged claimant, but not for misconduct. On September 6, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Consumer Cellular Inc. employed claimant from September 18, 2017 until July 2, 2019 as a team support specialist.

(2) The employer expected claimant to follow its attendance policy, which contained a call-out procedure requiring him to call and notify the employer no later than one hour after his scheduled start time if he was going to be late or absent from work. Failure to do so was considered a “no call, no show,” and counted as two “occurrences.” Exhibit 1. Employees who had more than three occurrences in a rolling 90-day period were subject to discharge. Exhibit 1. Claimant understood the employer’s call-out procedure.

(3) On February 21, 2019, the employer sent an email to claimant and the rest of his work team explaining its call-out procedure. On February 23, 2019, the employer gave a written explanation of its call-out procedure to claimant and his team members.

(4) On March 6, 2019, claimant was scheduled to start his shift at 6:30 a.m. Claimant did not report to work or call the employer by 7:30 a.m. because he overslept. The employer gave claimant a written warning for violating its call-out procedure. The written warning explained the employer’s attendance policy, including its call-out procedure.

(5) On May 21, 2019, claimant was scheduled to start his shift at 6:30 a.m. Claimant did not report to work or call the employer by 7:30 a.m. because he overslept. The employer called claimant and left

claimant a voicemail. The employer reiterated its call-out procedure and placed claimant on probation. The employer told claimant that an additional attendance violation before August 19, 2019 could result in discharge. Probation was the last step in the employer's progressive discipline.

(6) Before July 2019, claimant told his senior supervisor that he was having difficulties with his telephone and had to complete multiple "factory resets" on the telephone. Audio Record at 22:42. Each time he reset his telephone, he set multiple alarms to ensure he would wake in time to report to work on time.

(7) Late on July 1, 2019, claimant had an altercation with his "downstairs" neighbor and had to speak with the police about the incident until 12:20 a.m. on July 2. Audio Record at 18:34. Claimant intended to report to work on time on July 2 and set his alarm to wake himself to report to work on time.

(8) On July 2, 2019, claimant's scheduled start time was 6:30 a.m. Claimant's alarm did not function properly, or claimant slept through the alarm. Claimant did not call the employer or report to work by 7:30 a.m. The employer's assistant call center manager called claimant and left claimant a voicemail asking claimant to return her call. When claimant awoke, he heard the voicemail and called the manager. Claimant explained that he had been up late the prior night due to a conflict with his neighbor. The manager told claimant that he was discharged for violating 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 did not discharge claimant until he accumulated multiple "occurrences" from violating of the employer's call-out procedure, the employer would not discharged claimant when it did if claimant had not failed to follow the call-out procedure on July 2, 2019. Therefore, it is necessary to determine first whether claimant violated the employer's attendance expectations willfully or with wanton negligence on July 2. Only if claimant's conduct on July 2 was willful or wantonly negligent would claimant's prior attendance violations be analyzed to determine whether claimant's conduct on July 2 may be excused as an isolated instance of poor judgment under OAR 471-030-0038(1)(d)(A) and OAR 471-030-0038(3)(b).

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Barring illness or other exigent circumstances, the employer had the right to expect claimant to report to work as scheduled or follow its attendance policy. There is no dispute that claimant violated the employer's

attendance expectations on July 2 by failing to report to work by 6:30 a.m., or call the employer to report his tardiness or absence by 7:30 a.m. For his violation to be considered misconduct for the purpose of disqualifying him from receiving unemployment insurance, however, the violation must have been done willfully or with wanton negligence.

Claimant's violation was not willful because he set an alarm and intended to report to work on time on July 2. Nor was claimant's violation wantonly negligent, because wanton negligence requires an exercise of conscious indifference to the consequences of one's conduct. Claimant knew he was on probation from violating the employer's call-out procedure after oversleeping on March 6 and May 21, 2019. Claimant took reasonable steps to avoid violating the employer's attendance policy again by trying to repair his telephone with factory resets, and setting multiple alarms to ensure he was awakened by an alarm. The record shows that due to being overtired from the altercation with his neighbor, a telephone malfunction, or both, claimant did not hear an alarm the morning of July 2. By trying to repair his telephone, setting an alarm, and calling the employer back immediately when he awoke, claimant showed he was not indifferent to the employer's expectations. Accordingly, claimant's failure to report for work on time or follow the employer's call-out procedure was not a willful or wantonly negligent violation of the employer's attendance expectations.

Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 19-UI-135798 is affirmed.

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

DATE of Service: October 14, 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 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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 الإستئناف 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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