

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0950

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 15, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, and she was disqualified from benefits effective July 14, 2019 (decision # 91726). Claimant filed a timely request for hearing. On September 17, 2019, ALJ S. Lee conducted a hearing, and on September 25, 2019 issued Order No. 19-UI-137071, affirming the Department's decision. On October 2, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) McMinnville Grocery Outlet employed claimant as a cashier from August 14, 2018 to July 17, 2019.

(2) The employer expected claimant to report to work as scheduled. The employer generally excused five absences per year, and thereafter accommodated employees' requests for time off if the employee provided advance notice. Claimant understood the employer's expectations.

(3) By June 5, 2019, claimant had used her five excused absence days and had three additional unexcused absences. All but one of claimant's absences were due to illness; the other absence was due to a household emergency. The employer gave claimant a written warning that indicated any additional unexcused absence without more than same-day notice to the employer would be grounds for discharge.

(4) Claimant had scheduled a medical appointment for 2:00 p.m. on July 17, 2019 but forgot she had the appointment and did not ask for the time off work. The employer scheduled claimant to work on July 17th from 9:30 a.m. to 6:00 p.m. On the morning of July 17th, claimant realized she had the medical appointment later that day and notified the employer that she would not report to work as scheduled.

(5) On July 17, 2019, the employer discharged claimant for missing work without providing more than same-day notice to the employer that she would be absent.

CONCLUSIONS AND REASONS: Claimant's discharge was 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). Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The order under review concluded that claimant was wantonly negligent on July 17th when she provided the employer with same-day notice that she would be absent from work after previously being warned that she would be discharged for that conduct. Order No. 19-UI-137071 at 3-4. The record supports that conclusion. Claimant knew the employer would consider an absence with same-day notice a dischargeable offense and chose to be absent anyway, and the circumstances under which claimant chose to be absent – for a scheduled, non-emergency appointment – were both foreseeable and avoidable. Claimant’s conduct was wantonly negligent.

The order under review also concluded, however, that claimant’s conduct was not an isolated instance of poor judgment. Order No. 19-UI-137071 at 4. The order reasoned that claimant had “failed to report to work on various occasions throughout her employment without giving proper notice to the employer.” Order No. 19-UI-137071 at 3. Although the order is correct that claimant had, on eight occasions within a year, been absent from work, and that three of those absences were not excused, the fact that prior unexcused absences had occurred does not resolve the question of whether or not claimant’s conduct was excusable as an isolated instance of poor judgment.

In the context of an isolated instance of poor judgment, the term “isolated” means that “[t]he exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.” OAR 471-030-0038(1)(d)(A). In other words, for claimant’s prior unexcused absences to require a conclusion that her July 17th absence was not an isolated instance of poor judgment, those prior unexcused absences must have been the result of willful or wantonly negligent behavior on claimant’s part.

In this case, claimant’s prior unexcused absences were the result of illness or a household emergency. Under OAR 471-030-0038(3)(b), absences due to illness are not misconduct. Nor would claimant’s failure to provide the employer with more than same-day notice of absences due to illness be misconduct given the unlikelihood that she would have known prior to the day of the absence that she would be unable to report to work. Claimant’s absence due to a household emergency, likewise, was an exigent circumstance that was not foreseeable or plannable, and therefore her absence and failure to provide more than same-day notice of her absence were not wantonly negligent because the conduct did not, for example, occur as the result to claimant’s indifference to the employer’s expectations.

Because claimant's prior unexcused absences were not willful or wantonly negligent, her July 17th absence was isolated. Although an isolated act, under some circumstances, might exceed mere poor judgment and still be inexcusable as an isolated instance of poor judgment, that is not the case here. Conduct exceeds poor judgment when it is unlawful or tantamount to unlawful conduct, or it creates an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Claimant's decision to take July 17th off work for a medical appointment was not unlawful or tantamount to unlawful conduct. Nor is that the type of conduct which, objectively considered, would cause any similarly situated employer to conclude they had to end the employment relationship.

The employer therefore discharged claimant for an isolated instance of poor judgment that did not exceed mere poor judgment. Isolated instances of poor judgment are not misconduct. Therefore, claimant's discharge was not for misconduct, and claimant is not subject to disqualification from unemployment insurance benefits because of this work separation.

DECISION: Order No. 19-UI-137071 is set aside, as outlined above.

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

DATE of Service: November 7, 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 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 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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