EO: 200
BYE: 202040

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

324
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0005

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 23, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 123418). The employer filed a timely request for hearing. On December 5, 2019, ALJ Frank conducted a hearing, and on December 12, 2019 issued Order No. 19-UI-141131, affirming the Department's decision. On January 2, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Naegeli Deposition & Trial, Inc., employed claimant as a Client Relations Executive from July 8, 2013 until September 27, 2019.

(2) The employer had a tardiness policy reflecting its expectation that all employees report to work on time, and that where extenuating circumstances prevent a timely arrival, employees must advise a senior manager by calling the office. The employer deemed the policy necessary to ensure the provision of "five-star service to our clients and to [ensure] the smooth running of the corporation." Exhibit 1 (excerpt from the employer's policy) at 9. Claimant was aware of the policy.

(3) The employer had a sick leave policy that required employees to inform management of the need for sick leave prior to their designated start time. The policy stated, "Even excused absences, paid and unpaid, if excessive, can lead to discipline." Exhibit 1 (excerpt from the employer's policy) at 9. Claimant was aware of the policy.

(4) In calendar year 2019, claimant was absent from work on 30 occasions due to either vacation or medical/sick leave. Of those 30 absences, 13 occurred in an unpaid status, including her last absence on September 23, 2019 (unpaid sick leave). Also in calendar year 2019, claimant reported to work late on 23 occasions, including her September 27, 2019 discharge date. Regarding her tardiness violations, claimant always notified her manager if she would be late and always made up the missed time related to her tardiness.

(5) On August 21, 2019, claimant violated the employer's time clock requirements by failing to punch in/out for her mandatory 30 minute lunch break within six hours of her start time. The employer sent a warning email to claimant stating that management was unable to grant exceptions to the policy.

(6) On September 24, 2019, the employer convened a disciplinary meeting with claimant to address her "severe attendance issues." Exhibit 1 (September 24, 2019 disciplinary meeting notes) at 1. At the meeting claimant was presented with printouts reflecting her tardy dates and absences for calendar year 2019. The employer also advised Claimant that the company could not tolerate her poor attendance because "it [was] a burden on other team members who are working hard to meet attendance and workload requirements." Exhibit 1 (September 24, 2019 disciplinary meeting notes) at 1. The employer continued the meeting until September 27, 2019 at which point a decision would be made regarding how to best move forward.

(7) On September 26, 2019, claimant failed to clock in/out for her lunch break. That evening, the employer emailed her a second disciplinary warning (the disciplinary warning email). The disciplinary warning email explained that management's review of the daily clock punches revealed that there was no indication that claimant had taken her mandatory 30 minute lunch period for the day. This was claimant's second violation of the time clock requirement for lunch breaks, with the first being the subject of a similar warning email occurring on August 21, 2019.

(8) On September 27, 2019, claimant arrived to work on time, but inadvertently left her time car in her car. As a result of her oversight she ultimately clocked in to work five minutes late for her 8:30 a.m. shift.

(9) At 9:02 a.m. on September 27, 2019, claimant emailed a response to the disciplinary warning email, where she explained that "she could not break away" from "time sensitive client issues" and also had a sales meeting that prevented her from clocking out. Exhibit 1 (disciplinary warning email traffic) at 1. Claimant further indicated that she had offered to leave work early on the 26th "to offset the time", but was told not to. Exhibit 1 (disciplinary warning email traffic) at 1. Claimant also stated her view that this incident did not require a disciplinary warning. A manager subsequently responded to her email at 9:35 a.m. stating that notwithstanding her "understandable" client issues and meeting, "[a]ll violations of company policy will continue to result in disciplinary action regardless of reason." Exhibit 1 (disciplinary warning email traffic) at 1. Claimant forwarded this 9:35 a.m. response email to a co-worker at 9:42 a.m. The co-worker replied, "Good Lord." Exhibit 1 (disciplinary warning email traffic) at 1.

(10) At 4:00 p.m. on September 27, 2019, the employer convened the follow up disciplinary meeting that had been continued from September 24, 2019. At the meeting the employer discharged claimant based on her attendance issues, her tardiness issues, and her decision to forward emails about the time clock violation to a co-worker. Exhibit 1 (September 27, 2019 termination meeting notes) at 1.

CONCLUSIONS AND REASONS: Claimant was discharged from work, 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 demonstrate misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Order No. 19-UI-141131 concluded that although the claimant had knowledge of the employer's reasonable attendance policies, and although the employer's records demonstrated claimant's longstanding difficulties complying with those policies, there was insufficient evidence in the record which would allow for a determination that the claimant was discharged as a result of these attendance difficulties. Similarly, the order found that it was difficult to determine what incident or incidences actually led to claimant's discharge. To the extent the discharge was based on claimant's absence from work on September 23, 2019, the order noted that illness or injury are not misconduct. To the extent that the discharge was based on claimant's September 26, 2019 punch clock violation, and her subsequent decision to forward the disciplinary warning email traffic to a co-worker, the order concluded that the violation was excusable because claimant was speaking with a client at the time of the violation, and there was no evidence that the employer had a policy forbidding the type of email sent by claimant. Finally, to the extent claimant's discharge was based on her tardy arrival to work on September 27, 2019, the order concluded that the employer had failed to meet its burden in demonstrating that claimant's tardy arrival was the result of misconduct, and it was otherwise "likely that the employer had already decided to fire claimant by that point." Order No. 19-UI-141131 at 4.

We agree with the finding in Order No. 19-UI-141131 that the employer's attendance policies were reasonable and directed at legitimate business interests, and that claimant was aware of both the attendance polices and her responsibilities with respect to the policies. We also agree with the order's conclusion that the employer failed to demonstrate that claimant's discharge was the result of misconduct, however, we disagree with the reasoning provided for that conclusion.

The preponderance of the evidence demonstrates that the employer did not make its decision to terminate claimant until the day of her actual termination on September 27, 2019, and that it only did so after claimant arrived to work tardy on that date, and then forwarded the disciplinary warning email traffic to her co-worker. Until that point, the record reflects that claimant's employment trajectory was proceeding down a path of continued employment. Specifically, claimant's September 23, 2019 absence from work due to sickness triggered the disciplinary meeting that occurred on September 24, 2019. At that meeting, the parties discussed claimant's ongoing issues with attendance and claimant was advised that she needed to "course correct" moving forward. Audio Record at 16:57. The parties agreed to reconvene the meeting on September 27, 2019 to make a decision for how best to move forward. Likewise, the language in the September 26, 2019 disciplinary warning email suggests that the employer was only seeking to issue a second written disciplinary warning for claimant's lunch time punch clock violation, not to terminate claimant. Finally, the employer testified that prior to the discovery that claimant had forwarded the disciplinary warning email to a co-worker, whether to terminate claimant was still being discussed and the employer did not decide to discharge claimant until after the events of September 27th. Audio Record at 15:15.

The preponderance of the evidence does not establish that claimant's September 27, 2019 arrival to work five minutes late was misconduct. During the hearing, claimant could not recall the reason for her tardiness on September 27, 2019; however, the employer's exhibits demonstrate that but for her inadvertent mistake in leaving her time card in her car, she would have arrived to work on time. Thus, claimant's tardiness was the result of forgetfulness, not indifference to the consequences of being tardy. Because claimant's September 27, 2019 incidence of tardiness was not a willful or wantonly negligent disregard of the employer's attendance expectations, it is unnecessary for EAB to consider her prior alleged tardiness violations for misconduct. *See generally* June 27, 2005 Letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (the last occurrence of an attendance policy violation is considered the reason for the discharge).

Likewise, the employer has failed to establish by a preponderance of the evidence that claimant's action in forwarding the disciplinary warning email to a co-worker violated a reasonable employment policy of which claimant had prior knowledge. To the extent the employer has argued that the substance of the email amounted to insubordination, the record fails to include any employer policy addressing insubordination, or how that term would otherwise be defined, and the Director of Operations did not address this issue during the hearing. Moreover, an objective view of claimant's response to the disciplinary warning email reflects that claimant only stated her excuse for her failure to clock out, to wit: that she could not break away from time-sensitive, client-related issues, had a sales meeting, and offered to leave early to offset the time. While reasonable minds can differ regarding the impact of her statement that this was in no way an offense and that it required no disciplinary warning, the preponderance of the evidence does not establish that the statement constitutes misconduct because claimant's statement does not appear to have been the result of a willful or consciously indifferent violation of the standards of behavior the employer had the right to expect of her.

For these reasons, the EAB concludes that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Order No. 19-UI-141131 is affirmed.

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

DATE of Service:

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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