

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0066

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 25, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 75707). Claimant filed a timely request for hearing. On December 24, 2019, ALJ M. Davis conducted a hearing, and on December 31, 2019 issued Order No. 19-UI-141929, concluding that claimant's discharge was not for misconduct. On January 21, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument, some of which sought to introduce evidence not offered during the hearing. OAR 471-041-0090(1)(b) (May 13, 2019) allows EAB to consider such additional evidence if the party offering it shows that it is relevant and material, and that factors and circumstances beyond the party's reasonable control prevented the party from presenting it during the hearing. The employer's argument included the assertion that in addition to claimant's excessive "offline" Aux usage, the employer discharged claimant based on documented instances of claimant engaging in non-approved, non-productive Aux states without manager approval, and that claimant would do so to avoid taking additional calls at the end of his shift. The employer further suggested that it provided this documentation during these proceedings. To the contrary, the employer offered no exhibits (documentary or otherwise) during the hearing, nor did the employer allude to having relevant documentary evidence to introduce during the hearing. Furthermore, the employer has offered no explanation for how its failure to present this documentary evidence during the hearing was due to circumstances beyond its reasonable control. Therefore, EAB did not consider the additional evidence offered by the employer in its written argument and EAB considered the employer's argument only to the extent it was based upon the record.

FINDINGS OF FACT: (1) Conduent Commercial Solutions, LLC, employed claimant as a technical support advisor from September 1, 2017 until October 18, 2019.

(2) As part of the company's technical support team, the employer expected claimant to remain in one of several productive states, referred to as "Aux states," during the workday. Audio Record at 7:45 to 8:12.

Examples of Aux states included: talking to a customer, waiting to talk to a customer, “after call work”, and “offline”. Audio Record at 19:35. The employer had a zero tolerance policy that prohibited any employee from exceeding the allotted time in any particular Aux state. The employer considered a violation of that zero tolerance policy to be time theft.

(3) The employer considered claimant to be a senior level agent and at the time he was hired the employer authorized claimant 30 minutes of “offline” usage, as well as 30 minutes of break time. Claimant was not authorized to exceed these time limits unless he received management authorization.

(4) On September 11, 2019, the operations manager spoke with claimant after detecting that claimant had exceeded both his “offline” Aux time for that day, as well as his break time for that day. In each instance, claimant had exceeded his usages by 30 minutes. During the conversation, claimant explained that the additional break time was the result of gastrointestinal issues and that the additional “offline” usage was the result of other employees coming to him with questions. Claimant did not believe he exceeded his “offline” usage by more than a minute or two. Also during that discussion, the supervisor advised claimant that he could no longer go into the “offline” Aux state without first obtaining supervisor permission. Claimant received a verbal warning that day and claimant understood the employer’s expectations going forward.

(5) After the September 11, 2019 meeting, claimant changed the way he kept track of his “offline” Aux usage by always seeking supervisor permission before entering into the “offline” Aux state, and by annotating his “offline” usage “down to the second” once permission was received. Audio Record at 22:56. Based on these changes, claimant believed that he was meeting the employer’s expectation.

(6) Subsequently, claimant had multiple discussions with his supervisors regarding his attendance. Claimant’s attendance problems were based on his continuing gastrointestinal issues. The employer advised him that it was his decision to go home from work due to sickness, however, if the issue continued it might lead to repercussions.

(7) On October 18, 2019, the employer discovered that claimant had exceeded his Aux state usages for that day. Specifically, as of 2½ hours into his shift for that day, claimant had already exceeded ½ hour of Aux time over his allotment and at the time he was engaged by a supervisor that day he had already exceeded his allotted usage in the “after call work” Aux state by several minutes. Claimant had been struggling that day with logging certain call work due to logging procedure changes that had occurred and for which claimant had been previously unaware. Because of these struggles, claimant remained in the “after call work” Aux state longer than his allotment; however, he tried to get out of the “after call work” Aux state as quickly as he could. The employer discharged claimant that day for “Aux abuse”. Audio record at 7:45. The employer had claimant escorted from the worksite prior to claimant having an opportunity to respond to the reason for his discharge.

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 demonstrate misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer failed to meet its burden in establishing that claimant was discharged for misconduct. On the day of his discharge, claimant likely exceeded his Aux state usage allotment for the “after call work” Aux state. However, to the extent claimant may have done so, the evidence suggests that he only did so due to confusion over new logging procedures that had been implemented by the company, and he tried to exit the “after call work” Aux state as quickly as he could on that day. Furthermore, after the September 11, 2019 meeting, claimant made changes to his work routine to try to prevent going over the “offline” Aux state. Specifically, claimant ensured that he received supervisor authorization prior to entering the “offline” Aux state, and, once authorization was received, he began tracking his time within the “offline” Aux state. The preponderance of the evidence demonstrates that to the extent that claimant might have exceeded the time allotments authorized for certain Aux states, he did not do so intentionally or based on indifference to, or a conscious disregard for, the employer’s expectations or business interests.

Furthermore, to the extent the employer’s decision to discharge claimant was based in part on his attendance issues, the preponderance of the evidence reflects that claimant’s attendance issues were the result of his continuing gastrointestinal illness. Absences due to illness are not misconduct. OAR 471-030-0038(3)(b).

The employer therefore discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based upon this work separation.

DECISION: Order No. 19-UI-141929 is affirmed.

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

DATE of Service: February 18, 2020

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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