

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0072

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 5, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the claimant was discharged, but not for misconduct (decision # 71552). The employer filed a timely request for hearing. On December 31, 2019, ALJ Lohuis conducted a hearing, and on January 2, 2020 issued Order No. 20-UI-141956, affirming the Department's decision. On January 22, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Whole Foods Market employed claimant as a cashier from May 18, 2018 to October 9, 2019.

(2) The employer had a points-based time and attendance policy requiring its employees to show up on time for shifts, punch in and out correctly at the beginning and ending of shifts, work the entirety of shifts, and call a shift leader one hour prior to the start of any missed shifts. Failing to meet any of the individual requirements of the time and attendance policy would result in the accumulation of points. The accumulation of five or more points within 90 days would result in a verbal warning. The accumulation of four or more points within six months of the verbal warning would result in a first corrective counseling. The accumulation of four or more additional points within six months of the first corrective counseling would result in a second corrective counseling. The accumulation of three or more additional points within six months of the first corrective counseling would result in a final corrective counseling. The accumulation of three or more additional points within six months of the final corrective counseling could potentially result in separation from employment. Claimant received a copy of the time and attendance policy and she understood its terms.

(3) On February 28, 2019, claimant received a warning for accumulating nine points pursuant to the time and attendance policy. The employer warned claimant that the accrual of four or more points within six months of August 24, 2019 would result in a first corrective counseling from the employer.

(4) On April 14, 2019, claimant received a written first corrective counseling for accumulating five points pursuant to the time and attendance policy. The employer warned claimant in the written first corrective counseling that the accrual of four or more points within six months would result in second corrective counseling from the employer.

(5) On August 18, 2019, claimant received a written second corrective counseling for accumulating four or more points pursuant to the time and attendance policy. The employer warned claimant in the written second corrective counseling that the accrual of three or more points within six months of the first corrective counseling date (i.e., April 14, 2019) would result in final corrective counseling from the employer.

(6) On September 14, 2019, claimant received written final corrective counseling for accumulating five points pursuant to the time and attendance policy. The employer warned claimant in the written final corrective counseling that the accrual of three or more points between September 14, 2019 and March 13, 2020, might result in her separation from the employer.

(7) On September 29, 2019, claimant was absent from work due to an illness. Because claimant did not have enough sick leave remaining to cover the absence, she was assessed two points under the time and attendance policy for an unexcused absence.

(8) On September 30, 2019, claimant was tardy returning from her lunch break and was assessed one point under the time and attendance policy for tardiness.

(9) On October 9, 2019, the employer involuntarily separated claimant for violating the time and attendance policy. The discharge was the result of her accrual of three points for her September 29, 2019 absence from work (two points) and her September 30, 2019 tardiness violation (one point).

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). Absences due to illness are not misconduct. OAR 471-030-0038(3)(b). 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).

Claimant was aware of the provisions of the employers time and attendance policy and she violated the policy when she was absent from work on September 29, 2019, and when she was tardy on September 30, 2019. These two violations resulted in the assessment of three points under the employer's time and attendance policy. These three total points violated the provisions of the employer's final corrective

counseling to claimant and, as a result, the employer separated claimant for violating the employer's time and attendance policy.

However, the employer did not dispute that claimant's September 29, 2019 absence was due to illness, and absences due to illness do not constitute misconduct. Without the two points assessed for her illness-based absence on September 29, 2019, claimant would not have accrued enough attendance points to warrant a discharge under the employer's time and attendance policy, would not have been in violation of the employer's final corrective counseling, and would not have been discharged.

For these reasons, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Order No. 20-UI-141956 is affirmed.

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

DATE of Service: February 26, 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

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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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