EO: 700
BYE: 202045

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

374
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0306

Reversed & Remanded

PROCEDURAL HISTORY: On February 18, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 151726). Claimant filed a timely request for hearing. On March 30, 2020, ALJ Logan conducted a hearing, and on March 31, 2020, issued Order No. 20-UI-147124, affirming the Department's decision. On April 16, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant did not declare that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Market of Choice, Inc., employed claimant from December 4, 2019 to January 28, 2020, as a produce clerk.

(2) At all relevant times, the employer maintained an attendance policy for its employees. Under the policy, the employer referred to any missed worktime by an employee as an "occurrence," with each missed day of work resulting in the assessment of one to three occurrences, depending on the circumstances. Audio Record at 10:12 to 11:17. The employer allowed for the potential waiver of occurrences in those instances where the employee could replace the occurrence with any paid time off the employee had accrued. "Usually at about seven occurrences" the employer would suspend the employee in order to conduct a review of the employee's attendance situation. Audio Record at 10:43. If after the review the employer decided to discharge the employee for violating the attendance policy, the employer would inform the employee upon the employee's return to work after the suspension. At all relevant times, claimant was aware of, and understood, the employer's attendance policy.

(3) On January 9, 2020, the employer provided claimant a written warning about his attendance informing him that he had accrued 5.5 occurrences under the policy. Claimant signed and acknowledged the written warning.

(4) In mid to late January 2020, claimant missed two days of work due to an emergency medical situation involving his brother who lived in Bend, Oregon. Claimant did not inform the employer prior to his shifts on those two days that he would be absent from work. The employer charged claimant six occurrences for the two missed days (three occurrences per day for two days) under the attendance policy.

(5) On January 25, 2020, the employer issued two written warnings to the claimant about addressing his attendance problems. The first written warning informed claimant that he was over six occurrences. The second written warning informed claimant that he was at 14 occurrences. Claimant signed and acknowledged both written warnings.

(6) At some point between January 25, 2020, and January 28, 2020, the employer suspended claimant to further investigate his attendance situation. Due to his brief period of employment with the employer, claimant had not accrued any paid time off that could be used to offset his occurrences. On January 28, 2020, the employer discharged claimant for violating the attendance policy.

CONCLUSIONS AND REASONS: Order No. 20-UI-147124 is reversed and this matter remanded for further proceedings.

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 or other physical or mental disabilities, are not misconduct. OAR 471-030-0038(3)(b). 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).

The order under review concluded that the employer discharged claimant for misconduct because claimant was aware of the employer's attendance policy and because he was wantonly negligent in violating the employer's attendance policy. The order reasoned, in pertinent part:

> Claimant missed two days of work when his brother was hospitalized in Bend. He did not call employer to report his absence, and received the three attendance occurrences for each day that resulted from a no call/no show. While claimant could have minimized the number of policy violations by contacting employer to explain that his absence was due to an urgent family matter, he did not do so. While acknowledging the importance of an urgent family event, claimant chose to not report for work for consecutive shifts, and to not notify employer of his absence, at a time when his attendance occurrences had already imperiled his employment and resulted in a warning. As claimant had already been warned for his attendance, and so was aware that his subsequent failure to

> call or report for work would be a violation of employer's expectations, his conduct was wantonly negligent.
>
> … While it is understood that the two days of assistance rendered to the brother caused six of the 14 attendance points, claimant was already on warning for poor attendance at that time, and would have exceeded the limit of seven attendance occurrences without the two days in Bend. … [W]hile there may have been issues that affected claimant in the workplace, dissatisfaction in the workplace was not the cause of claimant's absences; his last six attendance points were related to a family emergency. Nor was claimant absent due to illness or a failure of transportation.

Order No. 20-UI-147124 at 2-3. Further development of the record is necessary as the record, in its current form, does not support these conclusions.

Although the employer may have discharged claimant for exceeding the number of occurrences allowed under the attendance policy, the proper initial focus of the misconduct analysis is claimant's last two absences, which were related to his brother's medical emergency. *See generally*, June 27, 2005 letter to 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).[1] The order under review found that claimant's last two absences "were related to a family emergency," but the order under review also apparently concluded that such a family medical emergency could not constitute an "absent due to illness," such that it qualified as an exception to misconduct under OAR 471-030-0038(3)(b). Order No. 20-UI-147124 at 5. Absences due to illness of the individual are not misconduct, however, EAB has customarily extended that exception to include absences due to the illness or disability of an individual's immediate family members.

While the preponderance of evidence supports the conclusion that claimant's final absences potentially qualified as absences due to illness, such that claimant's discharge may not have been for misconduct, further development of the record on this issue is necessary. On remand, additional inquiry should be directed to the circumstances surrounding the medical emergency suffered by claimant's brother, to include specific inquiry into the reasons why claimant did not attempt to notify the employer prior to the beginning of the two shifts that he missed. This additional inquiry focused on the circumstances surrounding the medical emergency suffered by claimant's brother, will allow for a more robust determination of whether the "absence due to illness" exception to misconduct is applicable in this case.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because

[1] Although the order under review found that claimant had already exceeded the seven-occurrence limit prior to the events surrounding his brother's medical emergency, and suggested that claimant would have been discharged for violating the attendance policy even without the occurrence of the medical events involving claimant's brother, the record does not support this conclusion. Instead, the preponderance of the available evidence demonstrates that claimant's absences related to his brother's medical emergency were the proximate cause of the employer's discharge decision.

further development of the record is necessary for a determination of whether the employer discharged claimant for misconduct, Order No. 20-UI-147124 is reversed, and this matter is remanded.

DECISION: Order No. 20-UI-147124 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: May 11, 2020

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-147124 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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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