

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0357

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 26, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct and claimant was disqualified from receiving unemployment insurance benefits effective January 20, 2019 (decision # 145649). Claimant filed a timely request for hearing. On April 23, 2020, ALJ J. Williams conducted a hearing, and on May 5, 2020, issued Order No. 20-UI-149283, affirming the Department's decision. On May 8, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. EAB did not consider claimant's written argument when reaching this decision because they did not include a statement declaring 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).

FINDINGS OF FACT: (1) Merritt 1 Inc. (Smoker Friendly) employed claimant as a gas attendant and cashier from December 21, 2018 until January 20, 2019.

(2) The employer expected employees to report to work as scheduled or to notify the employer of an absence in advance of a scheduled shift. The employer's attendance policy required an employee to call the employer if unable to work, and did not accept texting as a form of "calling out." Audio Record at 6:20. Claimant's manager told claimant at hire that he should call and not text when he wanted to "call out" from work. Audio Record at 19:49. However, the manager also told claimant that the policy was "more of a corporate rule." Audio Record at 19:53. The employee schedule stated that texting was not an acceptable form of "calling in." Audio Record at 6:38. Claimant saw the "no texting" policy on the employee schedule. Audio Record at 15:29.

(3) On two occasions prior to January 12, 2019, claimant sent his manager a text message to notify the manager that he was not able to report to work for a scheduled shift. Claimant did not call the manager on either occasion. On both occasions, the manager texted claimant back and stated that it was "fine" for claimant to miss work, and did not warn claimant that he was not permitted to send a text message to notify the employer that he would miss work. Audio Record at 15:02.

(4) On January 12, 2019, claimant was scheduled to work. Prior to his scheduled shift that day, claimant sent his manager a text message stating that he was not able to report to work for his shift that day. The manager sent claimant a text message in response stating, “That is fine.” Audio Record at 15:02. The manager did not tell claimant he was required to call to communicate his absence from work.

(5) On January 19, 2019, claimant sent his manager a text message stating that he was not able to work his scheduled shift that day. This was the fourth time claimant had called out from work by sending his manager a text message. The manager responded that claimant needed to speak with her on January 20, 2019 at the workplace.

(6) On January 20, 2019, claimant went to the workplace to speak to his manager. The manager told claimant that he was discharged “for the lack of communication,” because he had texted, rather than called, the manager to report that he was unable to work on January 19, 2019. Audio Record at 15:14.

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 establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for violating its attendance policy prohibiting texting as a form of calling out from work. Order No. 20-UI-149283 concluded that claimant was aware of and violated the employer’s policy.¹ Claimant was aware of the employer’s policy, yet sent a text message to his manager on January 19, 2019 to notify her that he would miss work that day. The record therefore supports the order’s conclusion that claimant violated the attendance policy. The order under review also concluded that claimant’s conduct was a willful violation, and that his violation on January 19, 2019 was not an isolated instance of poor judgment because it was a repeated act.² The order also reasoned that claimant did not have a good faith basis for believing that his manager permitted him to communicate absences by text message because the manager gave claimant a written warning on December 23, 2018 for reporting an absence by text message.³ However, the record does not support the order’s conclusion that claimant’s manager warned claimant about the text messages. To the contrary, the record shows that claimant’s January 19 violation occurred as the result of a good faith error on claimant’s part.

¹ Order No. 20-UI-149283 at 3.

² Order No. 20-UI-149283 at 3.

³ Order No. 20-UI-149283 at 3.

Claimant texted his manager to notify her about his impending absences from work on three occasions before the final incident on January 19. Claimant testified that, because he texted the manager on three occasions to notify her that he would miss work, and the manager “never mentioned anything about it,” and said that it was “fine,” claimant “never thought anything of it,” until he was discharged for sending a text message rather than calling on January 19. Audio Record at 15:32 to 15:46. Claimant’s testimony conflicts with testimony from the employer’s chief operating officer (COO). The COO testified that there was an “employee report” about claimant texting to call out in December 2018, and that claimant’s manager told her she had talked to claimant on December 23, 2018 about the ‘no texting to call out’ policy. Audio Record at 21:19 to 22:00. However, the COO’s testimony regarding what the manager told claimant is hearsay. Absent a reason to disbelieve claimant’s firsthand testimony or find that the employer’s hearsay evidence was particularly reliable, the evidence is no more than equally balanced as to whether the employer warned claimant not to use text messages after he did so on the first three occasions. It appears more likely than not on this record that claimant sincerely, if mistakenly, believed that he had adequately notified his manager of his January 19 absence by sending her a text message. Because claimant’s beliefs were reasonable, and based on a sincere but mistaken belief that he was complying with the employer’s expectations, his violation of the attendance policy on January 19 was the result of a good faith error. Good faith errors are not misconduct. Therefore, because claimant was discharged based on the January 19 violation, his discharge was not for misconduct.

For the foregoing reasons, claimant is not subject to disqualification from unemployment insurance benefits because of his discharge from the employer.

DECISION: Order No. 20-UI-149283 is set aside, as outlined above.

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

DATE of Service: June 11, 2020

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need 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.

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

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.