

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0777

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 28, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and claimant was disqualified from receiving unemployment insurance benefits effective May 17, 2020 (decision # 101843). Claimant filed a timely request for hearing. On October 27, 2020, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for November 10, 2020. On November 10, 2020, ALJ Wyatt convened a hearing and at the employer's request, postponed the hearing to November 30, 2020. On November 30, 2020, ALJ Logan conducted a hearing, and on December 1, 2020, issued Order No. 20-UI-157038, affirming the Department's decision. On December 10, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: On January 5, 2021, EAB granted claimant an extension to January 8, 2021 to submit a written argument. Claimant submitted written arguments on January 8, 2021 and January 9, 2021. Because claimant's January 9, 2021 argument was not received by EAB within the time period allowed under OAR 471-041-0080(4) (May 13, 2019), that argument was not considered by EAB when reaching this decision. OAR 471-041-0080(2)(b). Claimant's January 8, 2021 argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Starbucks Corporation employed claimant, last as a shift supervisor, from May 2012 to May 19, 2020.

(2) The employer expected its employees to report for work as scheduled. The employer's expectation was set forth in its written attendance policy, a copy of which claimant acknowledged at hire. Claimant was aware of the employer's attendance expectations.

(3) Claimant was diagnosed with chronic depression, insomnia and anxiety for which she received treatment through May 27, 2020. Exhibit 2.

(4) Prior to transferring to a new store in October 2019, claimant had not experienced problems with the employer's attendance policy. However, claimant failed to report for work at the beginning of her shift twice in October 2019, three times in November 2019, twice in December 2019, and twice in January 2020. On January 9, 2020, the employer issued a written attendance warning to claimant for her recent history of tardiness. The warning notice reminded claimant of the employer's attendance policy and specified the dates, scheduled start times, and arrival times for each of claimant's attendance policy violations. Exhibit 1.

(5) Claimant failed to report for work at the beginning of her shift twice in February 2020. On March 2, 2020, the employer issued a final written warning to claimant for those attendance policy violations. The warning notice specified the dates, scheduled start times, and arrival times for each of claimant's attendance policy violations. Exhibit 1.

(6) Claimant experienced the death of a close friend in November 2019, and of her grandmother in April 2020, each of which caused claimant substantial grief and worsened her depression and insomnia.

(7) The employer scheduled claimant to report for work for a shift beginning at 9:00 a.m. on May 19, 2020. Claimant was unable to fall asleep the night before her shift and remained awake through the night until approximately 5:00 a.m. on May 19, 2020. Claimant set an alarm on her cell phone to wake her in time to report for work, but forgot to charge the phone before falling asleep. The cell phone ran out of battery power, the alarm did not sound, and claimant overslept and did not wake up until around noon on May 19, 2020. After recharging her phone, she called the employer and explained that she had not reported for work because "her phone was dead and her alarm didn't wake her up." Transcript at 6. The employer instructed her to not report to work and discharged her that day for violating its attendance policy by failing to report for work as scheduled.

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) (September 22, 2020). "[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).

Order No. 20-UI-157038 concluded that the employer discharged claimant for misconduct, reasoning that although the record showed that claimant suffered from insomnia, anxiety, and depression, her failure to report for work on time on May 19, 2020 was not caused by her insomnia but, rather, "because

she forgot to charge the alarm that otherwise awakened her for work.” Order No. 20-UI-157038 at 4. The order also reasoned, “The failure to charge a phone is routine negligence, but because [claimant] was conscious from the warnings that tardy arrivals would violate [the] employer’s expectations, claimant’s failure to charge her phone . . . made her subsequent absence from work wantonly negligent.” Order No. 20-UI-157038 at 4. The record does not support that conclusion.

It is not sufficient to establish wanton negligence during the final incident that claimant “was conscious from the warnings that tardy arrivals would violate [the] employer’s expectations.” Where, as here, a claimant is discharged because of a failure to act, a finding that she did so with wanton negligence requires evidence that the failure to act was conscious. OAR 471-030-0038(1)(c). An unconscious failure to act is, at most, evidence of negligence, or the failure to exercise due care. Negligence, even repeated negligence, in the performance of work-related duties, may be a valid basis for a discharge, but it is not sufficient to establish misconduct under OAR 471-030-0038(3)(a).

Claimant was unable to fall asleep until approximately 5:00 a.m. on May 19, 2020 due to her insomnia, which had been aggravated by her grief over the passing away of her friend and grandmother. Transcript at 16, 20. Claimant failed to wake on time to report for work after her alarm failed to go off because her cell phone battery had died. The record supports the order’s conclusion that claimant “forgot to charge the alarm that otherwise awakened her for work.” Although claimant may have been negligent in failing to ensure that her phone was fully charged when she set the phone alarm, the record fails to show claimant consciously neglected to charge her phone or that she had a history of neglecting to charge her phone, such that conscious neglect to do so could reasonably be inferred. Accordingly, the record fails to show that the conduct for which claimant was discharged was either willful or wantonly negligent. For the reasons discussed above, the employer failed to meet its burden to show that the discharge was for misconduct as defined by OAR 471-030-0038(3)(a).

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Order No. 20-UI-157038 is set aside, as outlined above.

S. Alba and D. P. Hettle.

DATE of Service: January 15, 2021

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.

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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 desisyong ito.

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 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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